

**POLICY**

# **ELIMINATING RACIAL PROFILING IN LAW ENFORCEMENT**



**Ontario  
Human Rights Commission**  
**Commission ontarienne des  
droits de la personne**

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Ontario Human Rights Commission

Approved by the OHRC: June 20, 2019  
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ISBN: 978-1-4868-3694-9 (Print)  
978-1-4868-3695-6 (HTML)  
978-1-4868-3696-3 (PDF)

Available in various formats on request  
Also available online: [www.ohrc.on.ca](http://www.ohrc.on.ca)

Disponible en français



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## **Executive summary**

With extensive powers come great responsibilities. As the Supreme Court of Canada suggested recently in *R v Le*, requiring law enforcement organizations to meet their obligations under the *Charter of Rights and Freedoms (Charter)* and the *Ontario Human Rights Code (Code)* and to respect the rights of all people upholds the rule of law, promotes public confidence, and provides safer communities.

Canadian courts and human rights tribunals have long recognized that racial profiling exists, affects people from Indigenous and racialized communities, and is contrary to the *Charter* and human rights laws, including the *Code*.

The Ontario Human Rights Commission (OHRC) is a global leader in understanding and addressing racial profiling. Canadian and international human rights institutions and police oversight agencies regularly look to the OHRC for guidance on these issues. The Supreme Court in *R v Le* referred extensively to the OHRC's body of work on racial profiling, identifying the OHRC as a "highly credible and authoritative source." The court went on to note that courts may rely on OHRC reports as part of the "social context" when determining whether there has been a breach of the *Charter*.

This policy is about identifying and preventing both individual and systemic racial profiling in law enforcement. It is meant to be a resource, primarily for law enforcement authorities.

The OHRC defines racial profiling as any act or omission related to actual or claimed reasons of safety, security or public protection, by an organization or individual in a position of authority, that results in greater scrutiny, lesser scrutiny or other negative treatment based on race, colour, ethnic origin, ancestry, religion, place of origin or related stereotypes.

This definition of racial profiling includes racial under-policing, which refers to the failure to take appropriate action to protect the safety or security of an individual or group of people based on race, colour, ethnic origin, ancestry, religion, place of origin or related stereotypes, rather than proper investigations or preventative actions. The National Inquiry into Missing and Murdered Indigenous Women and Girls found many examples of racial under-policing.

Racial profiling is illegal and counterproductive. It undermines the powerful and important role that law enforcement authorities play in keeping the public safe. It is rooted in stereotypes, prejudice and negative attitudes about Indigenous and racialized people that are often, but not always, linked with criminality, deviance or dehumanization. Racial profiling is distinct from legitimate criminal profiling and use of reliable suspect descriptions.

The impacts of racial profiling are devastating for Indigenous and racialized people and their communities. Racial profiling is offensive to human dignity and can damage people's physical and mental health, self-image, self-respect, and feelings of being safe and secure. It perpetuates negative stereotypes and creates racial inequality by denying Indigenous and racialized people privacy, security and control over their day-to-day lives. It contributes to the over-representation of Indigenous and racialized people in the criminal justice system, which increases alienation and can result in individuals losing opportunities for employment, education and social mobility.

Racial profiling undermines trust in public institutions. There is clear link between public confidence in law enforcement and public safety. People are less likely to cooperate with investigations and provide testimony in court if they have negative perceptions of law enforcement.

Racial profiling can happen at any stage of decision-making by law enforcement authorities. It may result from an individual's explicit or implicit bias based on conscious or unconscious stereotypes, personal prejudice or hostility toward Indigenous or racialized people.

Racial profiling by an individual may be established where:

- A racialized or Indigenous person is singled out
- A racialized or Indigenous person is subject to unprofessional or degrading treatment
- There are deviations from normal practices
- There is a failure to assess the totality of circumstances before reaching a conclusion
- There is no sufficient, credible, non-discriminatory reason that explains the treatment experienced by the racialized or Indigenous person.

However, not all racial profiling is based on the individual actions of a few "bad apples." Canadian courts recognize that racial profiling is a systemic problem. Systemic racial profiling occurs when over-scrutiny and different treatment of Indigenous and racialized groups becomes an established and accepted part of the way an organization operates.

Systemic racial profiling can be driven by discretionary or inappropriate policies, practices or decision-making processes, as well as organizational culture. Activities that may contribute to racial profiling include:

- Deployment that selectively targets particular neighbourhoods or groups
- Proactive or pretext pedestrian or vehicle stops to question or detain people without reasonable suspicion
- Enforcement incentives and performance targets that reward stereotyping
- Setting priorities based on stereotypes rather than objective information about risk
- Certain techniques related to national security or anti-terrorism

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- Use of artificial intelligence including risk assessment tools such as “predictive policing” algorithms that rely on racially biased data
- Failure to take appropriate action to protect the safety and security of Indigenous or racialized persons and communities.

Law enforcement organizations must take steps to prevent, identify and respond to racial profiling, racial discrimination, harassment and other violations of the *Code*. This policy includes examples of best practices from law enforcement organizations that are successfully addressing racial profiling.

This policy identifies the following key principles and practices as the basis for positive change and respect for human rights in law enforcement:

- **Acknowledgement:** Substantively acknowledge the reality of racial profiling, including the impact it has on individual and community well-being and trust in law enforcement, and recognize the specific impact on Indigenous peoples and racialized communities and individuals
- **Engagement:** Actively and regularly engage with diverse Indigenous peoples and racialized communities to obtain frank and open feedback on the lived experience of racial profiling and effective approaches to combatting it
- **Policy guidance:** Adopt and implement all appropriate standards, guidelines, policies and strict directives to address and end racial profiling in law enforcement
- **Data collection:** Collect and analyze race data to identify and reduce disparity, and to manage performance
- **Monitoring and accountability:** Regularly monitor racial profiling, and set robust internal accountability mechanisms at the governance, management and operational levels
- **Organizational change:** Implement multi-faceted organizational change (for example, in relation to training, culture, hiring, incentive structures, etc.), consistent with the OHRC’s guide, *Human rights and policing: Creating and sustaining organizational change*
- **Multi-year action plan:** Form anti-racist action plans featuring initiatives geared toward achieving short-term and long-term targets for advancing all of these principles.

Building on these principles, Section 6 includes a comprehensive set of recommendations to governments, police services boards, police services and other law enforcement agencies to counteract and prevent racial profiling in policing and law enforcement.

## **1. Introduction**

...[R]acial profiling occurs and is a day-to-day reality in the lives of those minorities affected by it.

...

[R]acial profiling cannot be tolerated. It is offensive to fundamental concepts of equality and the human dignity of those who are subject to negative stereotyping. It fuels negative and destructive racial stereotyping of those who are subjected to profiling.

– Court of Appeal for Ontario, *Peart v Peel Regional Police Services*, 2006<sup>1</sup>

The Ontario *Human Rights Code* (*Code*) is a provincial law that sets out legal rights and obligations to protect people from discrimination based on race, ancestry, religion (creed), ethnic origin and other grounds. The *Code* prohibits all types of racial discrimination in five social areas, including when receiving services.

Racial profiling is an insidious and particularly damaging type of racial discrimination. The Ontario Human Rights Commission (OHRC) defines racial profiling as:

Any act or omission related to actual or claimed reasons of safety, security or public protection, by an organization or individual in a position of authority, that results in greater scrutiny, lesser scrutiny or other negative treatment based on race, colour, ethnic origin, ancestry, religion, place of origin or related stereotypes.

Canadian courts and human rights tribunals have long recognized that racial profiling exists and affects people from Indigenous and racialized<sup>2</sup> communities.<sup>3</sup> Racial profiling happens in different areas, such as the criminal justice system, retail services, child welfare, transportation and education.<sup>4</sup> It is often, but not always, influenced by negative stereotypes that link race with criminality and deviance.

This policy is about identifying and preventing racial profiling in law enforcement. Society gives law enforcement authorities a powerful and important role to keep the public safe by rooting out crime and maintaining public order. To fulfill this role, law enforcement officials must have the trust and cooperation of the public. Experiences of racial profiling disrupt this trust.

### **1.1. About this policy**

This policy is meant to be a resource, primarily, for law enforcement authorities. It provides detailed guidance on steps law enforcement organizations can take to identify, prevent and address racial profiling, meet their legal obligations under the *Code* and build trust with

## ***Policy on eliminating racial profiling in law enforcement***

Indigenous peoples and racialized communities. Section 30 of the *Code* authorizes the OHRC to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*.

This policy is meant to be read in conjunction with and as a companion to *Under Suspicion*, the OHRC's 2017 research and consultation report on racial profiling. *Under Suspicion* focused on the concerns of racialized and Indigenous peoples related to racial profiling, and the impact of racial profiling on their communities.

The following organizations and individuals will likely find this policy useful:

- Municipal police services, the Ontario Provincial Police, and First Nations police services, including senior command, uniformed officers and civilian staff
- Security guards and private investigators
- College and university campus law enforcement
- Transit officers and inspectors
- Officers who enforce provincial or municipal offences (e.g. Ministry of Natural Resources officers, municipal by-law enforcement officers)
- Security analysts or risk assessment personnel
- Others engaged in police-like activities (e.g. store staff enforcing loss prevention policies, people hired to manage event security, etc.)
- Police oversight agencies including police services boards, disciplinary tribunals, the Office of the Independent Police Review Director (OIPRD) and the Special Investigations Unit (SIU).

Throughout this policy, we refer to these individuals and groups collectively as “law enforcement” organizations, officers, institutions or authorities.

People from communities affected by racial profiling, human rights practitioners, Crown attorneys and defence counsel, policy makers and decision-makers will also find this policy useful. They can use it to identify racial profiling more clearly, hold law enforcement and government accountable, and advocate for specific reforms.

Section 45.5 of the *Code* states that the Human Rights Tribunal of Ontario (HRTO) may consider policies approved by the OHRC in a human rights proceeding. Where a party or an intervener in a proceeding requests it, the HRTO shall consider an OHRC policy. OHRC policies have been given deference by the courts and the HRTO, and quoted in the decisions of these bodies.

### **1.1.2. Research and consultation**

Combatting racial discrimination in law enforcement, including racial profiling, has been at the core of the OHRC's work for over 15 years. The OHRC has created resources to help law enforcement identify, monitor and reduce racial discrimination, including:

- *Count Me In!*, a guide to collecting human rights-based data
- *Human Rights and Policing*, a guide to creating organizational change
- *Paying the Price*, the OHRC's 2003 report on its inquiry into the effects of racial profiling<sup>5</sup>
- *Under Suspicion*, the 2017 research and consultation report on racial profiling<sup>6</sup>
- *A Collective Impact*, the 2018 interim report on the OHRC's inquiry into racial profiling and racial discrimination against Black persons.<sup>7</sup>

The OHRC has also made submissions to the government and independent reviewers outlining policy changes to promote accountability for systemic discrimination in law enforcement.

This policy, which is informed by this body of work, is based on social science and legal research, and consultation with key stakeholders including police across Ontario, Indigenous peoples, racialized communities, human rights practitioners, social science and legal experts and others.

To develop this policy, the OHRC:

- Reviewed Canadian case law
- Analyzed applications filed at the HRTO
- Reviewed social science literature
- Conducted an online survey that generated responses from almost 1,650 individuals and organizations about their experiences or reactions relating to racial profiling in Ontario
- Convened a three-day multi-stakeholder conference
- Conducted four focus groups with representatives from police associations, police services, and racialized police officers

## **1.2. The legal context**

The *Code* protects people from discrimination and harassment based on race and related grounds, including ancestry, colour, ethnic origin, place of origin, creed (religion), citizenship and other grounds in all areas the *Code* covers, including when receiving goods, services and using facilities (section 1).<sup>8</sup>

A fundamental aspect of the *Code* is that it has primacy over all other provincial laws in Ontario, unless the law specifically states that it operates notwithstanding the *Code*. This means that where a law conflicts with the *Code*, the *Code* will prevail, unless the law says otherwise. The *Code* supersedes the *Police Services Act* (PSA) and *Comprehensive Ontario Police Services Act, 2019*, whenever a conflict arises between these statutes.

The *Comprehensive Ontario Police Services Act, 2019*, which will repeal the *Police Services Act*, received Royal Assent on March 26, 2019, but has not yet been proclaimed. Appendix A in this policy describes police oversight agencies under the *Police Services Act* and the *Comprehensive Ontario Police Services Act, 2019*. We refer to both acts in this policy where applicable, given the interim period in which this policy was written.

People are also protected from discrimination based on perceived race and related grounds. This means that if a person who is discriminating presumes the target is a member of a certain *Code*-protected group, and if the target is discriminatorily treated based on “the social [stigma], prejudices or stereotypes attached to the group,” then *Code* protections apply to the target even if they are actually not a member of that particular group.<sup>9</sup>

**Example:** A steady stream of people are entering an office building when a security guard, stationed in the lobby, approaches only one person, a man wearing a turban. The guard begins to ask him a series of questions as to why he is in the building and where he is going. When the man objects to being singled out for such scrutiny, the guard responds by implying that Muslims present challenges to safety and security. Although the man with the turban is Sikh, not Muslim, he could nonetheless file an application with the HRTO on the grounds that he was discriminated against because the guard presumed he was Muslim.

## **The Canadian Human Rights Act, Charter of Rights and Freedoms and international human rights law**

The *Code* applies to organizations covered under provincial law, including both police and private security guards. The *Canadian Human Rights Act* applies to federally-regulated organizations – for example, airports, banks, border services, the Royal Canadian Mounted Police (RCMP) and national security organizations. Human rights legislation is also subject to the *Charter*, and must be considered in light of it.

The *Charter* applies to state actors, like the police, but not to private actors, like private security guards.<sup>10</sup> *Charter* guarantees relevant to racial profiling are:

- Section 15 guarantees an individual’s right to equality without discrimination because of race, national origin, ethnic origin, colour, religion, sex, and mental and physical disability, among other enumerated and analogous grounds<sup>11</sup>
- Section 7 gives everybody the right to life, liberty and security of the person and the right not be deprived of these things except in accordance with the principles of fundamental justice<sup>12</sup>
- Section 8 protects people against unreasonable search and seizure by the state,<sup>13</sup> and section 9 protects against being arbitrarily detained or imprisoned;<sup>14</sup>
- Section 10 outlines people’s rights upon arrest or detention.<sup>15</sup>

Racial profiling by police is a form of racial discrimination. It violates section 1 of the *Code*<sup>16</sup> and sections 7 and 15 of the *Charter*.<sup>17</sup> If racial profiling results in an unlawful search and detention/arrest, it could also violate sections 8 and 9 of the *Charter*.<sup>18</sup> If “illegitimate thinking” about race or racial stereotypes factors into suspect selection or subject treatment, the legal standards of reasonable suspicion or reasonable grounds will not be satisfied.<sup>19</sup>

Article 7 of the *Universal Declaration of Human Rights*,<sup>20</sup> article 26 of the *International Covenant on Civil and Political Rights*,<sup>21</sup> and the preamble of the *International Convention on the Elimination of All Forms of Racial Discrimination*<sup>22</sup> recognize equality before the law and the right to be free from racial discrimination, among other prohibited grounds. The Supreme Court of Canada has said that domestic law (which includes the *Code* and the *Charter*) should be interpreted in a way that is consistent with Canada’s international commitments under these instruments.<sup>23</sup>

Section 12 of the *Code* protects people who experience discrimination, harassment or reprisal because of their association, relationship or dealings with an Indigenous or racialized person or persons.

**Example:** A court found that a police officer stopped a car because the female driver was young and White and her male passenger was Black. The officer claimed to be concerned for the woman's safety because he thought it was possible that she was a prostitute in the company of her pimp. The court agreed that both individuals, including the White female driver, were racially profiled.<sup>24</sup>

The *Code* also protects people if they experience reprisal or threats of reprisal for claiming their rights.<sup>25</sup>

### **1.3. The role of police and law enforcement**

The *Police Services Act* governs policing in Ontario. It includes several guiding principles. The first principle emphasizes "the need to ensure the safety and security of all persons and property in Ontario." This principle aligns with the classic set of policing principles formed by Sir Robert Peel, the founder of modern policing, who declared "[t]he basic mission for which the police exist is to prevent crime and disorder."<sup>26</sup> Crime control, when conducted in a lawful way with a focus on public safety, is not generally controversial. Indeed, it is what many people have in mind when expressing support for police and other law enforcement agents.

Addressing "disorder," on the other hand, is more contentious. There are long histories of "disorder" being interpreted to justify law enforcement intervention in the lives of Indigenous and racialized people in the absence of criminal activity.<sup>27</sup> Notions of supposed disorder (e.g. Indigenous activism to oppose resource development projects or racialized youth congregating in public spaces) are often dictated by powerful interests to the detriment of less powerful groups.<sup>28</sup>

Whether the aim is crime control or maintaining order,<sup>29</sup> the *Police Services Act* and *Comprehensive Ontario Police Services Act, 2019*, both recognize that respecting people's human rights is a fundamental aspect of how police must deliver their services. As a core principle, both statutes explicitly outline the "importance of safeguarding the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*." Police services must also carry out their services while respecting the need for "sensitivity to the pluralistic, multiracial and multicultural character of Ontario society."<sup>30</sup> The Ontario Court of Appeal reviewed these principles and confirmed that "police officers therefore have a statutory duty to uphold the *Code*."<sup>31</sup>

Aside from police officers, conservation officers also engage in law enforcement and have considerable powers to fulfill their enforcement duties relating to natural resources laws as they apply to fish and wildlife, forestry, species at risk, parks, conservation reserves and so forth. Their powers include powers to conduct investigations, stops, searches (with or without warrants), seizures and perform arrests.<sup>32</sup> In its consultations, the OHRC heard Indigenous peoples' concerns about racial profiling by conservation officers.

Private security guards, whose work “consists primarily of guarding or patrolling for the purpose of protecting persons or property,” are governed by the *Private Security and Investigative Services Act, 2005*. They often enforce the *Trespass to Property Act*, where they can carry out arrests for summary or indictable offences while performing duties on private property. Otherwise, they may only make arrests for indictable offences in accordance with Section 494 of the *Criminal Code*. These arrests fall under the category of “citizen’s arrests.”<sup>33</sup>

### **1.3.1. Police chiefs and police services boards**

The chief of police is responsible for overseeing the operation of a police service in accordance with the *Police Services Act*, as well as the objectives, priorities and policies established by the police services board. The chief reports to the board and must comply with its lawful orders and directions.<sup>34</sup>

Police services boards oversee how policing is provided in their jurisdictions. Under the *Police Services Act*, boards are responsible for providing “adequate and effective police services.” Also, they have the authority to set objectives and priorities, establish policies for effectively managing the police service, and directing and monitoring the performance of the chief of police.<sup>35</sup>

Like police officers and the chief, police services boards are required to provide a service environment free of discrimination. The chief and the board are jointly liable for the discriminatory actions of officers, and have a joint responsibility for compliance with the *Code*.<sup>36</sup>

### **1.3.2. Police oversight**

The *Police Services Act* establishes the following oversight agencies: the Office of the Independent Police Review Director (OIPRD), Ontario Civilian Police Commission (OCPC) and Special Investigations Unit (SIU). The *Comprehensive Ontario Police Services Act, 2019*, establishes the following oversight agencies: the Law Enforcement Complaints Agency (LECA), Ontario Police Arbitration and Adjudication Commission, SIU and Inspector General. Appendix A describes police oversight agencies in Ontario under both statutes.

Discrimination under the *Code* is only one form of misconduct that can give rise to a public complaint insofar as it is a subset of discreditable conduct. Over the years, there have been several critiques of the civilian complaints process in Ontario.

For example, the public complaints process under the *Police Services Act* lacks independence from the police service that is the subject of the complaint. The OIPRD relies on police services themselves to conduct most investigations,<sup>37</sup> and the police service also prosecutes and

adjudicates complaints. However, under the *Comprehensive Ontario Police Services Act, 2019*, there is somewhat more independence in cases that may involve demotion or termination, or where the officer does not consent to discipline short of demotion or termination.

The mandates of the OIPRD or LECA are largely complaints-driven and therefore necessarily reactive. In the event that OIPRD or LECA choose to conduct a systemic review, their recommendations are not enforceable.

The OCPC primarily hears appeals and has only recently used its investigation and inquiry powers to address discrimination in policing (*i.e. Thunder Bay Police Services Board Investigation: Final Report*).<sup>38</sup>

Overall, under the *Comprehensive Ontario Police Services Act (COPS) 2019*, there is potential for police oversight agencies to address discrimination in policing, including racial profiling. This is because LECA can conduct a systemic review without a public complaint and investigate officer misconduct, including discrimination, without a public complaint. Further, the SIU is required to notify the LECA Complaints Director of officer conduct that may constitute misconduct, including discrimination, uncovered during an SIU investigation.

## **1.4. Why should law enforcement take steps to prevent racial profiling?**

### **1.4.1. Racial profiling is real and it is harmful**

The existence of racial profiling as a systemic reality – rather than a few isolated incidents – has been affirmed by courts, human rights tribunals and government-commissioned reports.<sup>39</sup> In 2019, the Supreme Court of Canada stated, “We have arrived at a place where the research now shows disproportionate policing of racialized and low-income communities.”<sup>40</sup> Several Canadian surveys<sup>41</sup> and police-related data sources<sup>42</sup> show that Black people (and in some cases, Indigenous, South Asian and Middle Eastern people) are stopped and/or searched by police more often than White people. These findings are reinforced by Black police officers in Ontario, who reported witnessing members of their police services engaging in racial profiling, and said that they themselves had experienced racial profiling while they were off-duty or working out of uniform.<sup>43</sup>

The OHRC documents the harms caused by racial profiling to individuals and communities in its consultation report on racial profiling, *Under Suspicion*, which is a companion to this policy.

### **1.4.2. Racial profiling is illegal**

Law enforcement organizations must meet their legal duties to uphold the *Code* and the *Charter*, and cannot ignore concerns about racial profiling, even if there are no formal complaints. A good understanding of racial profiling can help organizations meet their legal obligations and reduce exposure to costly, time-consuming and high-profile complaints and/or litigation.

### **1.4.3. Racial profiling is not effective**

A focus on race is inefficient because it diverts limited resources away from legitimate and more effective law enforcement activities. When law enforcement authorities rely on race to inform their suspicions, they risk ignoring important objective information needed to prove illegal activity and establish legal culpability.

There is strong evidence that singling out Indigenous and racialized people for greater scrutiny is not an effective or efficient way to fight crime.<sup>44</sup> Racial profiling is a logically flawed practice. Even if members of a certain racial group committed past crimes, it does not follow that a particular person from that group is more likely to have committed a crime or will be more likely to commit one in the future.<sup>45</sup> Also, when law enforcement authorities use profiles based even in part on race, criminal organizations can adapt by changing the profile of their agents to avoid detection. For example, in the context of national security, “when terrorists realize that law enforcement officers are profiling ... they are likely to seek operatives who do not match the profile.”<sup>46</sup>

### **1.4.4. Racial profiling undermines trust and legitimacy**

Experiences of racial profiling can shape how individuals and communities perceive the police.<sup>47</sup> Several Canadian surveys indicate that Indigenous and racialized people tend to have less favourable views of the police and the criminal justice system.<sup>48</sup> To perceive the system as legitimate, people must believe that they are being treated with respect, neutrality and transparency.<sup>49</sup>

Racial profiling can reduce the effectiveness and legitimacy of the criminal justice system.<sup>50</sup> Frayed community relationships reduce the likelihood of people reporting crime, cooperating with police investigations, and providing evidence in court.<sup>51</sup> If racialized and Indigenous community members are less likely to call police, they are less likely to be protected from crime, which increases their victimization and marginalization in society.

Requiring the police to comply with the *Charter* in *all* neighbourhoods and to respect the rights of *all* people upholds the rule of law, promotes public confidence in the police, and provides safer communities. The police ... better than anyone, understand that with extensive powers come great responsibilities.

– Supreme Court of Canada, *R v Le*, 2019

## 2. What is racial profiling?

### 2.1. Defining racial profiling: over-policing and under-policing

The OHRC *Policy and guidelines on racism and racial discrimination* identifies multiple forms of racial discrimination, including racial profiling.<sup>52</sup> Racial profiling is a type of racial discrimination<sup>53</sup> that takes place in organizational contexts where authority figures are employed to address issues of safety, security or public protection. Racial profiling is distinct from the lawful and legitimate practice of criminal profiling (discussed below).

The OHRC defines racial profiling as:

Any act or omission related to actual or claimed reasons of safety, security or public protection by an organization or individual in a position of authority, that results in greater scrutiny, lesser scrutiny or other negative treatment based on race, colour, ethnic origin, ancestry, religion, place of origin or related stereotypes.

This revised and updated definition of racial profiling builds and expands on the OHRC's 2003 definition.<sup>54</sup> The new definition can be broken down into its core elements:

- **Act or omission:** adds a reference to “omission” to encompass situations where authority figures fail to exercise due diligence based on racial stereotypes about certain categories of complainants or victims<sup>55</sup>
- **Actual or claimed reasons:** adds reference to “claimed reasons” to acknowledge that authority figures may not always act based on objective concerns about safety, security, and public protection
- **Safety, security and public protection:** recognizes that racial profiling is uniquely focused on actions associated with safety, security and public protection, whether in law enforcement or other contexts including education, transportation, health care, employment and border security<sup>56</sup>
- **By an organization or individual:** refers to both organizations and individuals to recognize that racial profiling may be systemic or individual

- **In a position of authority:** recognizes that racial profiling is particularly associated with the actions of authority figures
- **Results in greater scrutiny, lesser scrutiny or other negative treatment:** recognizes that racial profiling may manifest itself through greater scrutiny, lesser scrutiny (of victimization), or other negative treatment that is not exclusively related to scrutiny<sup>57</sup>
- **Based on race, colour, ethnic origin, ancestry, religion, place of origin or related stereotypes:** captures action based on either race-related *Code* grounds or related stereotypes to recognize that findings of racial profiling can be made in the absence of overt stereotyping.

In practice, racial profiling can happen at any stage of decision-making by law enforcement authorities. It can happen in decisions to place a person under surveillance;<sup>58</sup> stop, question,<sup>59</sup> search<sup>60</sup> or arrest;<sup>61</sup> lay excessive charges;<sup>62</sup> use force;<sup>63</sup> share a person's personal information with other agencies; prematurely close an investigation; dismiss a complaint as unfounded; etc. Racial profiling may also be evident in the behaviour of law enforcement during these interactions (e.g. aggressive manner, questions that rely on stereotypes, etc.). It can also occur even if there are some objective grounds for the treatment by law enforcement.<sup>64</sup>

This policy and new definition of racial profiling do not exhaustively identify and explain all the types of racial discrimination that can occur in law enforcement. Activity that does not strictly fall within the OHRC's definition of racial profiling may still constitute unlawful racial discrimination.

## **Social profiling**

Racial profiling can occur based on race in combination with other aspects of social location, such as poverty. Moreover, poverty or perceived poverty on their own can function as bases for profiling, regardless of the race of the person(s) involved.

The term “social profiling,” which captures this reality, has been defined by the Service de police de la Ville de Montréal (SPVM) as “any action taken by one or several persons of authority toward a person or group of people, for reasons of safety, security or public protection, which is based on elements of discrimination other than racial, as stated in section 10 of the Charter of Human Rights and Freedoms (Québec), such as social condition, and which subjects the individual to differential examination or treatment, without actual justification or reasonable suspicions.”<sup>65</sup>

Social profiling has a long history in Canada. In 1869, the *Vagrancy Act* came into force and defined various categories of people as vagrants including “all idle persons, who, not having visible means of maintaining themselves, live without employment”<sup>66</sup> and gave the police the power to arrest such persons.<sup>67</sup>

Although the *Vagrancy Act* is no longer in force, its spirit lives on in various forms. In urban tourist areas<sup>68</sup> and sites of extensive gentrification,<sup>69</sup> people who are visibly poor are regularly targeted by police, private security and public transit officers with the aim of decreasing the presence of “sub-populations perceived to be a visible nuisance.”<sup>70</sup> Importantly, this targeting occurs even in the absence of criminal activity. For example, homeless persons who are law-abiding nonetheless experience negative scrutiny by law enforcement on a regular basis.<sup>71</sup>

Social profiling is likely to have a disproportionate negative impact on Indigenous peoples and racialized communities. The 2016 census shows that Indigenous and racialized Ontarians are approximately twice as likely to be low-income when compared to White Ontarians.<sup>72</sup> The result is that profiling directed toward people based on social condition – in this case low-income status – can produce disproportionate racial impacts, even without explicit or implicit racial bias on the part of law enforcement agents.

## 2.2. Racial under-policing

Racial under-policing is the flipside of racial over-policing. The OHRC's recognition of racial under-policing as a form of racial profiling reflects the concerns and realities of Indigenous peoples and racialized communities. According to the American Civil Liberties Association, "Any definition of racial profiling must include, in addition to racially or ethnically discriminatory acts, *discriminatory omissions* on the part of law enforcement as well."<sup>73</sup>

Under-policing generally refers to inadequate law enforcement responses to the victimization or probable victimization of an individual or group of individuals. For example, there have been longstanding concerns of under-policing related to sexual assaults against women<sup>74</sup> and violence against LGBTQ2+ communities.<sup>75</sup>

Racial under-policing is more specific: the failure to take appropriate action to protect the safety or security of an individual or group of people based on race, colour, ethnic origin, ancestry, religion, place of origin or related stereotypes, rather than proper investigations or preventative actions.

Under-policing, which takes the form of acts of omission or commission, is underpinned by explicit or implicit distinctions between worthy and unworthy victims. Also, it has both individual manifestations (e.g. an investigating officer who makes derogatory comments about victims) and systemic dimensions (e.g. a law enforcement organization that consistently conducts poor investigations into Indigenous deaths).

**Example:** The violent leader of a well-known gang had a reputation for periodically driving into rival territory and shooting individuals deemed, by him, to be probable rival gang members.<sup>76</sup> One day, while under close proximity to police surveillance, and in violation of a court order, the gang leader drove into rival territory, shot and injured two young Black men, drove off and was later apprehended by police.<sup>77</sup> The fact that the police could have arrested him before the shooting led one judge to speculate on whether they would have intercepted and arrested him if he was heading to an affluent and predominantly White area of the city with similar violent intentions.<sup>78</sup>

Under-policing based even in part on race and related grounds is a form of racial profiling contrary to the *Code*.<sup>79</sup>

### **Did you know? Preferential under-policing**

Beyond practices of neglect in relation to Indigenous and racialized crime victims, under-policing can take a very different form – “favoritism toward an offending class.”<sup>80</sup> Given limited law enforcement resources, racial profiling, as a manifestation of over-policing directed toward Indigenous and racialized populations, can entail the under-policing of White people who are engaged in criminal activity. The OHRC describes these race-specific patterns of law enforcement as preferential under-policing.<sup>81</sup>

This is perhaps most often illustrated in the area of drug enforcement, where arrests and charges for possession are disproportionately directed toward racialized groups despite their drug use levels being equal to or lower than those of White people as measured by self-report drug use surveys,<sup>82</sup> police hit rate data,<sup>83</sup> and race-specific figures on drug overdose deaths.<sup>84</sup>

#### **2.2.1. Indigenous experiences of under-policing**

Indigenous peoples have long expressed concerns about missing and murdered Indigenous women and girls, and in recent years, governments and law enforcement have finally acknowledged these concerns.<sup>85</sup> Although estimates of the number of affected women and girls vary, “the general consensus is that the numbers are staggering.”<sup>86</sup>

The Government of Ontario has implicitly acknowledged racial under-policing in this context, stating: “more could have been done to meet the needs of Indigenous communities.”<sup>87</sup> A high-ranking OPP official recognized that inadequate law enforcement investigations can be influenced by anti-Indigenous racism,<sup>88</sup> family members of affected women and girls sometimes have difficulties securing updates from police,<sup>89</sup> and hiring more Indigenous women as police officers would increase the quality of police responsiveness to missing and murdered Indigenous women and girls.<sup>90</sup>

The final report of the *National Inquiry into Missing and Murdered Indigenous Women and Girls* outlines the historical, cultural and political dimensions of under-policing. Racial dehumanization is a recurring theme, and on multiple occasions the term “disposable” is used to convey how the dominant society often regards Indigenous women and girls.<sup>91</sup>

Within this environment, law enforcement action and inaction takes the form of unresponsiveness to missing person reports, regular patterns of victim-blaming and related practices. The safety of Indigenous women and girls is undermined because of continued impunity for violence committed against them.<sup>92</sup>

Substantial bodies of evidence indicate that Indigenous peoples have been especially affected by under-policing.<sup>93</sup> Across Canada, over many years, a variety of inquiries, research reports and experts have noted that Indigenous people “are often seen as less worthy victims by the police”<sup>94</sup> and that a lack of “supportive police services”<sup>95</sup> can result in problems such as “poor response time to incidents.”<sup>96</sup> The Ontario *Data Standards for the Identification and Monitoring of Systemic Racism* also acknowledges under-policing, with specific reference to Indigenous people.<sup>97</sup>

Some key manifestations of under-policing, as it affects Indigenous communities, include:

- Slow responses to 911 calls<sup>98</sup>
- Speaking about victims in derogatory terms,<sup>99</sup> such as “drunks,” “prostitutes unworthy of follow-up,” etc.<sup>100</sup>
- Inadequate and inappropriate responses to missing persons cases, particularly involving Indigenous women and girls<sup>101</sup>
- Quick presumptions of sudden deaths as being caused by accidents or suicides, when in fact, foul play may be involved<sup>102</sup>
- Ruling out criminal involvement in sudden death cases before autopsies have been completed<sup>103</sup>
- Offering relatively low rewards, or no rewards, for crime-solving information.<sup>104</sup>

**Example:** The body of an Indigenous male was discovered in a river by a passerby who then summoned the local police by calling 911. Three hours later, police issued a press release stating there were no indications that the death was suspicious. Then, 25 hours after the body was found, the police, without interviewing witnesses or waiting for the completion of the autopsy, concluded the death was non-criminal. After a lead investigator told them that the deceased may have drunk, passed out and drowned after rolling into the river, family members hired a private investigative agency. This investigation revealed that, among other things, the deceased was in a physical altercation with another man the night before his body was found, and that his debit card had been used *after* his death.<sup>105</sup>

Indigenous community members consulted by the Ontario Federation of Indigenous Friendship Centres highlighted a host of concerns about under-policing. Some people noted that police failed to comply with their own protocols for appropriate responses to missing person reports; others cited instances where front-line officers refused to take crime reports seriously until an Indigenous community member contacted upper management.<sup>106</sup>

### **2.3. Establishing racial profiling**

Under the *Code*, to establish *prima facie* (on its face) discrimination, the person making a claim must show:

1. They have a characteristic protected by one or more of the *Code* grounds (e.g. race and related grounds)
2. They experienced adverse or negative treatment or impact in one of the social areas under the *Code* (e.g. in policing or law enforcement services)
3. The protected characteristic was a factor in the adverse treatment or impact.<sup>107</sup>

The claimant must show on a “balance of probabilities” (more likely than not) that adverse or negative treatment happened. The analysis should be flexible and look at all relevant factors in the situation, including the full impact on the affected person or group.

The Court of Appeal for Ontario recognizes that racial stereotyping will usually be the result of unconscious beliefs, biases and prejudices<sup>108</sup> and that racial profiling can rarely be proven by direct evidence.<sup>109</sup>

In considering racial profiling, race only needs to be one factor in the alleged conduct. Race need not be the cause, the main factor, or even a major factor in the adverse treatment. Racial profiling can be found to have occurred even if race was mixed in with other legitimate factors.<sup>110</sup> While there may be evidence of “intent,” or motivation to discriminate, this is not needed to prove discrimination.<sup>111</sup> The focus is the effect of the actions on the claimant.

Racial profiling may be based on racialized characteristics in combination with race and related grounds. It may also be based on stand-alone racialized characteristics that could be treated as proxies or “stand-ins” for race, some of which are more closely race-linked than others. Examples are:

- Clothing and grooming
- Accent or use of a language other than English
- Having a name not usually associated with the dominant population
- Neighbourhood characteristics: e.g. living in an area that is highly populated by Indigenous or racialized people or appearing to be “out of place” in an affluent neighbourhood
- Associations: e.g. alleged gang affiliations, being labelled as “known to police”
- Activities: e.g. travelling to places suspected of drug production<sup>112</sup> or to places where there are suspected terrorist activities, engaging in activism around the rights of marginalized people
- Vehicle characteristics: e.g. age, condition or make of vehicle, customized appearance (such as tinted windows).<sup>113</sup>

Also, although use of stereotypes may be evidence of racial profiling, proof of stereotyping is not required to establish discrimination.<sup>114</sup> As well, evidence of a crime uncovered through racial profiling cannot be used to justify the racial profiling.<sup>115</sup>

Once *prima facie* discrimination is established, the burden shifts to the organization or person responsible to provide a credible non-discriminatory explanation for the action, or in systemic racial profiling cases, justify the policy, practice or requirement as reasonable and *bona fide* (legitimate) in the circumstances.<sup>116</sup>

### **2.3.2 Intersecting Code grounds**

Discrimination may be unique or distinct when it involves two or more *Code* grounds. The concept of intersectional discrimination recognizes that people's lives involve multiple interrelated identities, and that marginalization and exclusion based on *Code* grounds may exist because of how these identities intersect.

Due to stereotypes that uniquely relate to intersecting identities, Indigenous and racialized people may be particularly vulnerable to racial profiling based on multiple *Code* grounds. For example, the identities of being "young," "Black" and a "man" intersect in a socially significant way. Because these intersecting identities are linked to pervasive stereotypes about criminality, young Black men are particularly at risk of being racially profiled by law enforcement.<sup>117</sup>

**Example:** A young Black male was driving his mother's Mercedes SUV to a barbershop. After parking his car, exiting his vehicle and walking to the shop, officers, who had been following him on the road, ordered him to stop. They held him, handcuffed him and searched his vehicle. Although they claimed to have initially approached him based on improper driving, an Ontario Superior Court of Justice judge concluded that "the real reason for the stop was racially motivated: a young black male was driving a Mercedes, and... [the lead officer] believed something illegal was going on."<sup>118</sup>

Indigenous and racialized women and transgender people may be profiled in gender-specific ways as suspected shoplifters, drug users, drug couriers or sex workers.<sup>119</sup>

There is a socially significant intersection between race and mental health that may affect officer decisions about use of force. There are stereotypes about Black people regarding violence and criminality, and concerns that police are more likely to use force in their interactions with Black people.

Furthermore, people with mental health disabilities may be more likely to be subject to officer use of force because of responses to police instructions or behaviours that may seem unusual, unpredictable or inappropriate, or due to police reliance on stereotypical assumptions about dangerousness or violence.<sup>120</sup>

Poverty or being perceived to have low income are important factors that can intersect with race and other *Code* grounds, and can contribute to someone being singled out for scrutiny.<sup>121</sup>

**Example:** The HRTO found that a police officer discriminated against an Indigenous man when the officer wrongly investigated and arrested him for stealing his own bicycle. The police officer’s suspicions were based on the apparent “disconnect” between the man’s alleged appearance and his “expensive looking” bike. The adjudicator found that the officer’s depiction of the man as dirty and disheveled was a “proxy for degrading racial stereotypes of Aboriginal people” and that the officer’s suspicions were based on stereotypes about Indigenous people being “poor, uncivilized, lacking of credibility, and prone to criminality.”<sup>122</sup>

Racial profiling is more likely to happen to low-income Indigenous and racialized youth and people when they are in public spaces, such as parks, shopping malls and streets. These groups may be more visible to law enforcement and vulnerable to assumptions that they are engaging in unlawful activities.<sup>123</sup>

When interacting with people, organizations and their representatives should use an individualized approach that recognizes the unique intersecting identity of each person, without relying on preconceived notions, assumptions or stereotypes.

## **2.4. Criminal profiling and suspect descriptions**

Law enforcement organizations may rely on criminal profiling as a method for identifying suspects. They also often respond to descriptions of suspects to select people for investigation. Both situations can give rise to racial profiling depending on how race is relied on.

### **2.4.1. Criminal profiling**

Law enforcement authorities often use criminal profiles – a systemic analysis of associations between serious crimes and the physical, behavioural or psychological characteristics of individuals who have committed such crimes – to hone in on possible suspects.

The RCMP defines criminal profiling as “an investigative tool used within the law enforcement community to help solve violent crimes. The analysis is based on a review of evidence from the crime scene and from witnesses and victims.”<sup>124</sup> This definition, in conjunction with the fact that the purpose of criminal profiling is to “narrow the pool of suspects for a known crime,”<sup>125</sup> means that criminal profiling differs considerably from racial profiling.

Unlike racial profiling, which is highly discretionary and affects many innocent people, criminal profiling involves focused investigative efforts, done in response to serious crimes, that are evidence-based and therefore far less discretionary and less likely to affect innocent people.

The Supreme Court of Canada has said that police may rely on characteristics used in criminal profiles, but “profile characteristics are not a substitute for objective facts that raise a reasonable suspicion of criminal activity.”<sup>126</sup>

**Example:** A police officer selected only Vietnamese last names from a property registry to conduct an investigation into potential marijuana grow operations (grow-ops). Despite not having any indication that the owner of one of the properties, or her husband, were involved in running a grow-op, the police officer put the house under surveillance. He observed several indicators associated with grow-ops at the property. Based on this information, the property was searched, found to be a grow-op and the husband was arrested and charged. A court ruled that the husband had been racially profiled and his *Charter* rights violated because the selection of Vietnamese names led to the investigation. The court said, “The use of race as a proxy for criminal activity renders any police investigation or detention of individuals unlawful, even if I find here there are other lawful grounds justifying the sequential actions of the police.”<sup>127</sup>

Although some case law suggests that race or related grounds might legitimately form part of a criminal profile alongside other objective factors, there is no clear guidance on whether, or in what situations, this would be permissible and consistent with human rights laws.<sup>128</sup>

In human rights and criminal law, it is a recognized principle that racial profiling can occur even where race is one factor among other legitimate factors used to single someone

out.<sup>129</sup> Therefore, it is the OHRC's position that extraordinary caution must be taken when using criminal profiles that include race or related grounds, even if these are coupled with other objective factors.

### **2.4.2. Suspect descriptions**

Law enforcement authorities may also act based on information about illegal activity received from victims, surveillance, witnesses or crime reports.

However, law enforcement officials cannot cast their investigative net widely on Indigenous and racialized individuals when dealing with a vague suspect description involving race.<sup>130</sup> A vague or unreliable description (for example, based merely on sex, skin colour and age range) may give rise to racial profiling concerns.<sup>131</sup>

**Example:** In one human rights case, a police officer investigated a gun call at a shopping centre. He was told to look for a young Black man, alone, in a black car that might be a sports car, but was aware that this information may not be reliable. The officer decided to follow and investigate a young Black man, who fit the physical description and was driving a black sports car in the general vicinity away from the shopping centre. There were many routes away from the mall, there was nothing in the man's driving to give rise to suspicion, and he drove to a house where the car was registered. The HRTO found that relying on this vague description to start an investigation of the man in the absence of other evidence was racial profiling.<sup>132</sup>

It is **not** racial profiling to act on a reliable physical description of a particular suspect linked to a specific illegal incident where race or related grounds are descriptors alongside other personal characteristics and information, and the person is investigated because they reasonably match that description.<sup>133</sup> In the context of street checks, this has been affirmed in Ontario Regulation 58/16.<sup>134</sup>

**Example:** Reports of undercover officers indicate that some students from the local college are buying cocaine at a particular apartment complex. The students are described as young White males ranging in height from 5'10" to 6'2" with brown hair. When observing the complex, an officer sees a person who matches the description wearing a backpack with the name of the college on it entering the complex and leaving five minutes later. Police can properly consider race as one factor in the physical description and accompanying information to stop the student for suspicion of drug activity.<sup>135</sup> However, if police only have information to "be on the lookout" for young White males, and there is no further physical description or information linking the person to a crime, this information would not be sufficient to make a stop.

## 2.5. Organizational liability

Organizations have a legal duty and ultimate responsibility to maintain an environment free from racial profiling, racial discrimination and harassment based on race and related grounds. They must take steps to prevent and respond to violations of the *Code* or they may be held liable and face monetary penalties or other orders from a tribunal or court.

Under section 46.3 of the *Code*, a corporation, trade union or occupational association, unincorporated association or employers' organization will be held responsible for discrimination, including acts or omission, committed by employees or agents in the course of their employment. This is known as "vicarious liability."<sup>136</sup>

Responsible parties violate the *Code* where they directly or indirectly, intentionally or unintentionally infringe the *Code*, or where they otherwise authorize, condone or adopt behaviour that is contrary to the *Code*.

It is unacceptable to choose to remain unaware, ignore or fail to address potential or actual human rights violations, whether or not a complaint is made.<sup>137</sup> Law enforcement authorities may be held responsible for a breach of the *Code* if they do not take measures to monitor and prevent individual situations of racial profiling, or address individual situations of racial profiling with a response that involves reviewing and restructuring these practices, policies, programs, etc.

**Example:** A police service has shown longstanding patterns of racial profiling as indicated by community grievances about racial profiling, statistical analyses showing significant disparities in pedestrian and traffic stops, and HRTO rulings in favour of applicants who experienced racial profiling. Nonetheless, the police services board takes no measures to address the problem. Given that the board is akin to a board of directors of a corporation,<sup>138</sup> it can be held liable for discriminatory actions carried out by members of the police service.<sup>139</sup>

Multiple organizations may be held jointly liable where they all contribute to racial profiling and other forms of discrimination. Tribunals and courts may also find organizations liable because they failed to respond appropriately to discrimination and harassment. Organizations may face higher damages as a result.<sup>140</sup>

### 3. Racial profiling by individuals

Existing analysis of racial profiling tends to highlight the role of individuals in positions of authority. This analysis tends to focus on the role of bias – both explicit and implicit – and various actions that indicate racial profiling.

#### 3.1. Explicit and implicit bias

Racial profiling may result from an individual's explicit bias or conscious stereotypes. These stereotypes may be rooted in personal prejudice and hostility against Indigenous or racialized people.<sup>141</sup> Although law enforcement officers who hold overtly racist sentiments are the minority, their abuse of power can do substantial damage to the lives of Indigenous and racialized people.<sup>142</sup>

**Example:** A transit enforcement officer always checks the transfers of racialized youth because he assumes they will try to cheat the system.

Racial profiling arising from an individual's explicit bias can have a broader, systemic impact, such as when a person in authority directs another person or organization to single out Indigenous and racialized people for monitoring and different treatment.

**Example:** A store owner directs her staff to display hair products typically used by Black women in locked cabinets because she assumes these customers will steal. She also tells her staff and security guards who monitor the store to closely watch Indigenous and racialized customers.

Also, racial profiling often results from internal implicit bias, which is based on racial stereotypes people hold without being consciously aware of them.<sup>143</sup> Often without realizing it, people categorize others they do not know by their perceived group membership, and then “attribute to these individuals the stereotypes associated with their group.”<sup>144</sup> Relying on these stereotypes can lead to racial profiling, even if there is no intent to discriminate.

Where implicit bias influences the actions of a law enforcement officer, there may be little direct evidence of discriminatory conduct.

**Example:** Using recordings from body-worn cameras, a U.S. study looked at the language police officers during stops. Out of approximately 1,000 stops, police did not utter a single racial slur. Yet researchers found that officers stopped, searched, handcuffed and arrested significantly more African American people than White people. These differences existed even after controlling for neighbourhood crime rates and demographics. The researchers concluded that the racial disparities were not due to overt bias but more subtle cultural norms, beliefs and practices.<sup>145</sup>

## 3.2. Establishing racial profiling by an individual

To establish racial profiling where an individual law enforcement officer's behaviour is at issue, it must be shown that the officer had some opportunity to observe or presume the race of the claimant<sup>146</sup> and that this knowledge led the officer to act in a discriminatory way.

Racial profiling can usually only be detected after looking in at the totality of the circumstances. The following relevant factors can be relied on to determine if racial profiling occurred:

- Unprofessional or degrading statements or treatment
- Deviations from normal practice
- Failing to assess the totality of circumstances
- No sufficient, credible, non-discriminatory reason.

### 3.2.1. Unprofessional or degrading statements or treatment

Statements made during an interaction may indicate the existence of stereotyping or prejudice including:

- The use of racial slurs<sup>147</sup>
- Statements that view someone as "foreign" (e.g. "In this country we don't ...")
- Assumptions about someone's ability to speak English<sup>148</sup>
- Inquiries premised on stereotyping (e.g. "What are you doing in this neighbourhood?")<sup>149</sup>
- Questions that do not relate to the investigation at hand (e.g. "Where are you from?" or "Are you Canadian?").<sup>150</sup>

Importantly, while some of these statements, *by themselves*, are strong evidence of racial profiling (e.g. racial slurs), others may be legitimate based on the offence being investigated. Where they may be legitimate, such statements would likely indicate racial profiling only when uttered in association with other related statements (e.g. questioning a person about their presence in a particular neighbourhood *and* questioning them about their citizenship status).

Findings of racial profiling have also taken into account evidence that the law enforcement officer was brusque, rude, unyielding or hostile.<sup>151</sup>

**Example:** A store supervisor confronted a Black woman shopping. The supervisor did not introduce or identify herself, spoke with an elevated voice and demanded that the woman open her knapsack to see if she had stolen something. The supervisor did not apologize even after she did not find anything in the bag. This rude behaviour was in contrast to her normal polite behaviour. Based on this and other evidence, the HRT0 inferred that the conduct was racial discrimination.<sup>152</sup>

However, racial profiling can still happen where a law enforcement officer's manner is non-offensive.<sup>153</sup>

**Example:** Police officers in a certain jurisdiction tend to consider racialized drivers as particularly suspicious within neighborhoods that are predominantly White. Officers often run computer checks on the license plates of racialized drivers instead of pulling them over. The result is that there are no significant racial differences in who is stopped, but at the level of license plate checks, racialized drivers are far more likely to be scrutinized than White drivers.<sup>154</sup>

### **3.2.2. Deviations from normal practice**

A finding of racial profiling may be supported where law enforcement officers depart from common procedure or the way they typically carry out their duties.<sup>155</sup>

**Example:** A security guard follows a racialized man out of a store and tells him that store staff suspect him of stealing, both that day and on previous visits. He then tells the man he is banned from the store. The usual approach taken by the security guard is to make sure – rather than merely suspect – that someone is stealing before banning them. This departure from standard practice may constitute evidence of racial profiling.

Other examples of deviations from normal practice include:

- Over-reacting or responding “heavy-handedly” to an incident
- Spending excessive time and energy investigating a minor offence<sup>156</sup>
- Unjustified use of force<sup>157</sup>
- Unnecessary or overly-intrusive searches<sup>158</sup>
- The use of intimidation tactics<sup>159</sup>
- Charging the individual with multiple offences related to a single incident (overcharging)<sup>160</sup>
- Unwarranted surveillance or stops of the person after they have been cleared of wrong-doing<sup>161</sup>
- Failing to adequately investigate the deaths or disappearances of Indigenous or racialized persons.<sup>162</sup>

Explicit bias on the part of law enforcement is evident when people in the same situation, and engaged in the same activities, are treated differently along racial lines. In deciding whether race was a factor in the conduct, human rights decision-makers have considered whether the events would have played out the same way if the person was White.<sup>163</sup>

**Example:** In *Maynard v Toronto Police Services Board*, the officer was investigating a gun-related incident involving a Black male suspect driving a black sports car, and decided to follow the man because he was a young Black man driving alone in a black BMW. The HRT0 noted that the officer had no indication of the suspect's age, and stated that the most reasonable explanation for the officer's decision was that the claimant was a "black man, and specifically a young black man, driving a black vehicle ... and as a result, he was stereotyped as a person with some probability of being involved in a gun-related incident."

The HRT0 explained that it was consistent with a finding of racial profiling where all Black men driving alone in the area in a black car became possible suspects. The HRT0 found that if the suspect had been a White man in the same circumstances, with no other defining characteristics, and with as little information available about the car and direction of travel, the officer would probably not have chosen to investigate the first White man he saw driving a black car somewhere in the vicinity of the Malvern Town Centre.<sup>164</sup>

**Example:** Police "stop and question" activities in the form of street checks have sometimes been carried out by separating White youth from racialized youth to focus exclusively on the racialized youth. In his report on street checks, Justice Michael Tulloch observed: "Groups of young people on their way to school were stopped and asked for their identifying information, sometimes with only the racialized members of the group being questioned."<sup>165</sup>

The speed that a routine incident escalates into an arrest, use of force or other punitive action may reveal a law enforcement officer's lack of reasonableness or departure from common practice.<sup>166</sup>

**Example:** The HRT0 found that a Black woman was racially discriminated against by police while delivering newspapers very early in the morning. She was approached by an officer who saw her driving erratically. Since women were being assaulted by a man impersonating a police officer, and she was aware of these assaults, the officer's presence made her fearful. She refused to answer his repeated requests for identification because she was trying to call her husband. Instead of explaining why he wanted to talk to her, the officer cautioned her, arrested her, pushed her against a patrol car and handcuffed her. The adjudicator noted that a salient aspect of the case was how quickly a routine traffic encounter escalated into an arrest where both people were injured.<sup>167</sup>

### **3.2.3. Failing to assess the totality of circumstances**

Law enforcement officers must keep an open mind by carefully assessing the totality of circumstances.<sup>168</sup> Depending on the context, decisions made in a close-minded way may be evidence of racial profiling. Examples include:

- Presuming Indigenous or racialized people are guilty<sup>169</sup>
- Conducting one-sided investigations<sup>170</sup>
- Basing conclusions on weak evidence<sup>171</sup>
- Dismissing reasonable explanations or contradictory evidence.<sup>172</sup>

**Example:** Mall security called police after a Black woman was (wrongly) accused by mall security of stealing a bra. The police officer immediately adopted an “assumption of guilt” approach to his investigation by asking “Where’s the bra?” He subjected her to two physical searches, which turned up nothing. Even after reviewing video footage that provided only weak evidence of theft, he continued to assume she was guilty. The HRT0 found that based on the factors taken together, the officer subjected the woman to a heightened level of scrutiny during the investigation because she was Black.<sup>173</sup>

Racial profiling can also happen when police or law enforcement disregard a specific suspect description in favour of investigating someone whose only matching characteristic is their race, skin colour or ancestry. Care should be taken when law enforcement officers use “sweeps” to scrutinize groups of racialized individuals when a more precise approach could be used, based on the information available.

**Example:** A woman was sexually assaulted on a university campus. She reported the assault to campus police, who then forwarded the report to local police. The victim described the suspect as a Black male, mid to late 20s, 6’1” to 6’3” with light skin, a thin build and no facial hair. Disregarding this specificity, the police stopped, questioned and in some instances recorded the personal information of several Black males on or around the campus, many of whom did not come close to matching the description. Individuals who were short, muscular, bearded, etc. were caught in the investigative dragnet. These actions raise concerns about racial profiling.

Whether consciously or unconsciously, some people make racially-biased complaints about Indigenous or racialized people to law enforcement. If law enforcement authorities accept complaints at face value without considering available information that they are based on racial bias, and without conducting a neutral investigation, they may be held responsible for racial profiling.<sup>174</sup>

**Example:** Police arrest an Indigenous woman because they immediately accept a store manager’s assertion that she has stolen merchandise from a store. The woman says she has been wrongly accused. Police do not take steps to determine the

credibility of the store manager versus the credibility of the woman, do not look at the available video evidence or interview other witnesses. These actions raise concerns about racial profiling.

### **3.2.4. No sufficient, credible, non-discriminatory reason**

A hunch grounded entirely in intuition gained by experience is not a sufficient, credible non-discriminatory explanation for singling someone out for scrutiny or treating them adversely based on race.<sup>175</sup>

**Example:** A security guard follows and questions a racialized woman wearing a hijab who enters an office, because he believes she may be doing something suspicious. The security guard has no objective information to believe the woman is doing something wrong but acts on his own intuition. If his decision is based on the woman's creed, race, or related stereotypes, this will amount to racial profiling.

Similarly, nervousness<sup>176</sup> or an individual's perceived disrespect towards law enforcement are not sufficient reasons for singling people out. For example, Indigenous and racialized youth may be fearful or reluctant to engage with law enforcement. Also, widespread negative stereotypes about Indigenous and racialized people may cement incorrect assumptions about people having a bad "attitude."<sup>177</sup> Furthermore, if law enforcement officials approach people in a disrespectful or hostile way, they may be met with negative reactions, that in turn reinforce existing stereotypes.<sup>178</sup> There may also be cultural differences in how people communicate.<sup>179</sup>

A person's presence in a "high-crime" area or an area with suspected drug activity cannot, in and of itself, be a reason for police to detain someone.<sup>180</sup> Where someone is Indigenous or racialized and is stopped based only with this rationale, this may raise concerns about racial profiling.<sup>181</sup>

**Example:** A racialized university student was driving in an area known for drug trafficking. After stopping him, and citing the nature of the neighbourhood as a justification, police then claimed that the presence of two cellphones in his car indicated he was a probable drug dealer. In fact, however, he was carrying two cellphones because he worked for a cellphone company.

Law enforcement officials should be wary of considering common, innocuous or ambiguous behaviours as "suspicious" just because Indigenous or racialized people are engaging in them.<sup>182</sup> Behaviour should be viewed objectively and not through the lens of stereotypes.<sup>183</sup>

**Example:** Two police officers stopped a Black man walking down the street. One of the officers had a hunch the man was violating bail conditions (in fact, he was not on bail).<sup>184</sup> The other officer saw that the man looked at the police cruiser as it passed and was concerned that he might be carrying a weapon because he had his hands in his pockets. A court found that the officers' views were unreasonable, and were "coloured by the fact that [the man] was black and by their unconscious or conscious beliefs that black men have a propensity for criminal behaviour." This was found to be racial profiling.<sup>185</sup>

Law enforcement officers must have credible, non-discriminatory and *bona fide* (legitimate) reasons for inquiring about someone's immigration status or checking someone's status through federal immigration authorities.<sup>186</sup> Where law enforcement officers ask about immigration status or conduct status checks based on someone's place of origin, race, colour, name, accent, other racialized characteristics or stereotypes relating to these factors, instead of objective factors, the conduct may be racial profiling.<sup>187</sup>

**Example:** A Black man witnessed a crime and went to the police station to give a statement. He gave no indication of his immigration status during his interactions with police. While at the station, the officer conducted an immigration check with the Canadian Border Service Agency (CBSA) and notified him that there was a warrant for his arrest and detention. Police gave no indication of why they checked his name, though he speculates that their decision to do so was underpinned by racial considerations. In his view, specifically, they would not have called CBSA if he was White.<sup>188</sup>

Even where law enforcement authorities conduct immigration checks routinely in interactions with community members, this practice would likely negatively affect racialized citizens and non-citizens in Canada with or without legal status, and may contravene the *Code* based on the ground of citizenship.<sup>189</sup>

Where a law enforcement officer's explanation for their actions is not credible, it may support a conclusion of racial profiling.<sup>190</sup>

**Example:** A court found that a Black man was racially profiled when police stopped him and searched his vehicle, leading to an arrest for drug possession for the purposes of trafficking. The court found that the police officers' evidence for stopping and searching the man was inconsistent with the documentary evidence and defied common sense. The court concluded that they fabricated significant portions of it. On this basis, the court inferred that the man was singled out because he was a young Black male driving an expensive car.<sup>191</sup>

Law enforcement can act on objective grounds, and these grounds are relevant in providing a non-discriminatory explanation for negative treatment. Although the absence of objective grounds for negative treatment can lead to an inference of racial profiling, the presence of objective grounds does not necessarily undermine a finding of racial profiling.<sup>192</sup> In the recent decision of *Dudhi*, the Court of Appeal for Ontario quoted from its decision in *Peart* and stated that racial profiling can exist “regardless of whether the police conduct that racial profiling precipitates could be justified apart from resort to negative stereotyping based on race.”<sup>193</sup>

## **4. Understanding systemic racial profiling**

Many people believe that addressing the behaviour of a few “bad apples” – individuals who display overtly racist attitudes and behaviours – will solve the problem of racial profiling. But more than a century of anti-Indigenous racial profiling,<sup>194</sup> combined with decades of profiling directed toward racialized groups, indicates that systemic racial profiling must be identified and addressed.

Courts and tribunals recognize that racial profiling is a systemic problem in policing.<sup>195</sup> In *R v Le*, the Supreme Court of Canada said: “members of racial minorities have disproportionate levels of contact with the police.” The Court also recognized that “the impact of the over-policing of racial minorities and the carding of individuals within those communities without any reasonable suspicion of criminal activity is more than an inconvenience.” The Court found “the research now shows disproportionate policing of racialized and low-income communities.”<sup>196</sup>

Systemic racial profiling results from patterns of behaviour, policies or practices that are part of the social or administrative structure of an organization or institution, which perpetuate a position of relative disadvantage for Indigenous and racialized people. The behaviour, policies, etc., may appear neutral, but nevertheless result in Indigenous or racialized individuals or groups being singled out for greater scrutiny or different treatment.

Overall, systemic racial profiling means that over-scrutiny and different treatment of Indigenous and racialized groups become an established and accepted part of the way an organization operates. It becomes part of the “normal” way of doing things. When analyzing systemic racial profiling, the focus is on institutional policies, practices and procedures, and the resulting outcomes and effects.

**Example:** A human rights tribunal ruled that the owner of a shopping mall and the security company it employed engaged in a pattern of discriminatory treatment of Indigenous people and people with disabilities. The tribunal looked at the “orders” that were used by the mall to direct the security officers on which people to scrutinize and remove from the mall, including people with “ripped clothing,” “dirty clothing” and/or people who displayed “attitudes when approached.” The tribunal found that

“taking signs of poverty as evidence of suspiciousness” – such as ripped clothing – had an adverse impact on Indigenous people (who experience relatively high rates of poverty) and that the “attitude” element of the mall orders had a similar impact since Indigenous people “may not see any obligation to voluntarily cooperate with a security guard who has negatively prejudged them.” As a result, the tribunal identified the policies of the mall and the practices of the security officers as evidence of systemic discrimination.<sup>197</sup>

The *Code* prohibits discrimination that results from requirements, qualifications or factors that appear neutral but have an adverse or negative effect on people identified by *Code* grounds.<sup>198</sup>

At the same time, the *Code* allows an organization to show that the requirement, rule, policy or factor is “reasonable and *bona fide*” (legitimate) in the circumstances. To do this, the organization must show that the needs of the person cannot be accommodated without undue hardship, meaning excessive costs or significant health and safety risks.<sup>199</sup>

The Supreme Court of Canada has set out a framework for deciding whether a *prima facie* (on its face) discriminatory requirement, rule or standard is reasonable and *bona fide* in the circumstances.<sup>200</sup> The organization must show on a balance of probabilities (more likely than not) that the requirement, rule, etc.:

1. Was adopted for a purpose or goal that is rationally connected to the function being performed
2. Was adopted in good faith, in the belief that it is necessary to fulfil the purpose or goal
3. Is reasonably necessary to accomplish the purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.<sup>201</sup>

Ultimately, for a person or organization to justify a discriminatory requirement, policy, rule or standard, they must show that accommodation was incorporated into the standard to the point of undue hardship. This means that the requirement or policy was designed or changed to include as many people as possible, measures that have a less discriminatory effect were sought, and that any remaining individual needs were accommodated, short of undue hardship.

Law enforcement organizations should design their service delivery rules, requirements, policies and approaches up front to avoid potential discriminatory impacts and to ensure that they are *bona fide* (legitimate).

**Example:** To address a rise in crime in a neighbourhood with many racialized residents, a police service considers employing a “zero-tolerance” policing policy. The policy would require an increased police presence in the area. To prevent more serious crimes, police would be instructed to arrest people for minor offences such as littering, vandalism,

panhandling and drinking in public. However, police become concerned that this approach could lead to increased arrests for racialized people, including youth. It may also create tension with the community and could raise human rights concerns.

They decide the approach is not necessary to accomplish their goal of increasing community safety. Instead, they use approaches that meet this goal but have a less negative effect, including working with community groups to prevent, pinpoint and address specific crimes, and use diversion approaches for more minor offences, particularly when they involve youth and people with mental health disabilities.

Organizations and institutions have a positive obligation to make sure they are not engaging in systemic discrimination.<sup>202</sup> In the Ontario Civilian Police Commission's *Thunder Bay Police Services Board Investigation Final Report*, Senator Murray Sinclair said that police services boards "have a positive obligation to address allegations of systemic discrimination,"<sup>203</sup> a conclusion supported by the Supreme Court of Canada's decision in *Odhavji Estate v Woodhouse*.<sup>204</sup>

Senator Sinclair found that one of the key roles of police boards is to "be alert to events, trends and issues within their community and the impact on the effectiveness of police services." As a representative of the community, a police board has the responsibility to "assess the presence of systemic discrimination and racism within its own operations and governance practices, particularly where allegations have been made against them."<sup>205</sup> Failing to act where there is evidence of systemic racism can amount to "wilful blindness."

In ultimately recommending that an Administrator be appointed to take over the powers of the Thunder Bay Police Service Board, Senator Sinclair found that that board was "aware of concerns regarding policing and Indigenous peoples in Thunder Bay but chose to passively tolerate, refute or ignore these issues, rather than obtain proper information about them; that action can be characterized as wilful blindness in the discharge of their duties."<sup>206</sup>

## **4.1. Establishing systemic racial profiling**

Law enforcement organizations can become aware of possible systemic racial profiling through external sources including the media, Indigenous and racialized individuals and communities, human rights experts, academics, oversight bodies (e.g. HRTO, OIPRD, courts), government-appointed reviewers and international human rights bodies. It can also learn about possible issues from internal sources such as officers and staff or racial disparity data.

In situations where systemic racial profiling may exist, organizations should consider the following to proactively identify, monitor and address it:<sup>207</sup>

- Numerical data
- Policies, practices and decision-making processes
- Organizational culture.

#### **4.1.1. Numerical data**

Race-based data collection is an important component of a comprehensive strategy to reduce racial profiling. Appropriate data collection in law enforcement is necessary to effectively monitor racial profiling, identify and remove systemic biases, lessen or prevent disadvantage and promote substantive equality.

Law enforcement organizations should collect and analyze data when they have or ought to have reason to believe that racial profiling may exist. In these cases, collecting and analyzing data should be a component of the positive duty to take action to prevent a violation of the *Code*.

Numerical data showing that members of Indigenous or racialized communities are disproportionately represented in stops, searches, arrests, charges, use of force incidents, etc., may be strong circumstantial evidence that discriminatory practices exist.

It is important to collect data using the best available methodological approaches.<sup>208</sup> Also, keep in mind that numbers cannot be interpreted by themselves, without understanding the assumptions that underlie them, the lived experiences of communities represented by the numbers, and analysis of relevant contextual factors.

The Ottawa Police Service collected race-based data on traffic stops from 2013 to 2015 as a result of settling a human rights complaint alleging racial profiling. Researchers found that Black and Middle Eastern people experienced disproportionately high incidences of traffic stops. Although the study did not identify whether these disproportionalities stemmed from the actions of individual officers or systemic factors, the OHRC concluded that the data was consistent with racial profiling, particularly when considered in light of racial profiling concerns raised by community members.

Where the data reveals that there is a problem, even if it cannot reveal the cause of a disparity, law enforcement organizations must be prepared to act. In a recent case, the HRTO described the “critical secondary work” that is needed when data reveals a problem. It said that “data collection is just a first step, albeit a significant one, in addressing racial disproportionalities arising from policing practices.” The HRTO strongly urged the police service to take the next steps in the process – “to identify to the best of its ability what is

causing or contributing to these disparities through conducting further research, and then based on the research findings, to develop and implement specific strategies to reduce and hopefully eliminate these disparities.”<sup>209</sup>

The OHRC’s position is that “in keeping with the preventative and remedial purpose of the *Code*, there is a positive duty to take corrective action to ensure that the *Code* is not being and will not in future be breached. Just as organizations and institutions have an obligation to conduct an investigation once aware of an allegation of racial harassment, awareness that racial discrimination may exist may call for an investigation that involves the collection of data.”<sup>210</sup>

#### **4.1.2. Policies, practices and decision-making processes**

Evidence of systemic racial profiling may also be found in a law enforcement organization’s informal or informal policies, procedures and decision-making processes.

One way policies, procedures and decision-making processes can lead to racial profiling is by allowing informal or highly discretionary decision-making processes. The less formal the process, and the less closely decisions are regulated or monitored, the more opportunity there is for subjective considerations and racial bias to come into play.<sup>211</sup> This is one reason why racial disparities in traffic stops tend to be much higher for general patrol units, which exercise high discretion, compared to radar units which exercise much less discretion, given their reliance on technology rather than human judgement.<sup>212</sup>

Also, policies, practices or decision-making processes may be inherently biased. This may happen when they are based on criteria that appear to be neutral but which nevertheless penalize or lead to greater scrutiny of racialized or Indigenous peoples because they fail to take into account their actual needs, circumstances or cultural norms.<sup>213</sup>

**Example:** Racialized youth in a low-income area spend a lot of time hanging out on sidewalks in the summer, in large part because most of them live in apartment buildings without air conditioning and without common spaces to gather. The police, viewing their presence as disorderly and potentially intimidating to passersby, often approach the youth and tell them to go somewhere else. On one occasion, a couple of youth who did not comply with a police demand to move on were arrested and charged with disturbing the peace and obstruction of justice. Although the charges were later dropped, the incident fuelled heightened tensions and distrust between the youth and the police.

Sometimes a group's particular circumstances, such as their historical disadvantage or their specific rights and entitlements, are factors that give rise or contribute to the systemic racial profiling they experience. In any analysis of whether systemic or institutional discrimination is taking place, it is necessary to consider these circumstances.

Many Indigenous peoples raise concerns about being unfairly charged for hunting, fishing or trapping without a license, despite being allowed to do so as part of their constitutionally protected traditional harvesting rights.<sup>214</sup> A systemic racial profiling analysis would consider whether the enforcement organization's policies and culture, standards, decision-making processes and practices, etc. lead to these adverse effects.

The Supreme Court of Canada has made it clear that systems must be designed to be inclusive of all persons.<sup>215</sup> The racial and Indigenous diversity that exists in Ontario should be reflected in the design stages of programs and policies so that biases and barriers are not created. Where biases already exist within systems and structures, they should be actively identified and removed.

#### **4.1.3. Organizational culture**

An important component of systemic racial profiling is an organization's culture. This can be described as shared patterns of informal social behaviour, such as communication, decision-making and interpersonal relationships, which are the source of deeply-held values, assumptions and behavioural norms. A single organization may have multiple sub-cultures, each reflecting the common norms, values and unwritten assumptions of people at various levels of the organization.

The following elements of organizational culture may contribute to systemic racial profiling:

- **Workforce lacks diversity:** In institutions that lack racial diversity in management and among front-line officers,<sup>216</sup> staff may be less likely to understand the experiences of racialized and Indigenous community members, more likely to rely on stereotypes, and likely to identify with policies or practices that have a negative effect
- **Disconnection from community:** General suspiciousness and a sense of distance from the general public can create an "us versus them" attitude,<sup>217</sup> which may be more often applied to Indigenous peoples and racialized communities
- **Militarism:** An emphasis on militarism, use of firearms, and quickly physically subduing suspects contributes to a "warrior"<sup>218</sup> mentality, which may lead to unnecessarily adversarial interactions with Indigenous and racialized community members

- **Secrecy:** Because of the critical need to depend on each other, there is high degree of solidarity between front-line officers which may lead to a commitment to secrecy, including keeping silent about other officers engaging in racial profiling<sup>219</sup>
- **Favouring “common sense” over reasonable suspicion:** Through training and socialization, organizations may condone or encourage relying on stereotypes to develop “common-sense” profiles of people believed likely to engage in illegal activity.<sup>220</sup>

**Example:** As part of an organization’s special constable training, trainers and more experienced officers tell new recruits that they need to be on the lookout for people who look “sketchy” or “like thugs.” But because of widespread assumptions that exist about Indigenous and Black youth being more likely to engage in criminal activity, without important qualifiers or adequate training on implicit bias, this type of advice can make it more likely that officers will single out Indigenous and racialized youth for suspicion. This advice may be a reflection of racial profiling as a normalized part of the organization’s culture.

In instances when these elements contribute to racial profiling they should be examined and addressed, counteracted or eliminated to foster organizational norms that support Code-compliant law enforcement.

## **4.2. Activities that may contribute to systemic racial profiling**

The way a law enforcement organization structures its activities may lead to systemic racial profiling. These activities may contribute to or raise greater risk of systemic racial profiling:

- Unwarranted deployment
- Proactive or pretext stops
- Enforcement incentives and performance targets
- Setting priorities that adversely affect Indigenous and racialized communities
- Techniques related to national security or anti-terrorism
- Risk assessment and predictive policing.

### **4.2.1. Unwarranted deployment**

Police services are entitled to assign their officers to different neighbourhoods to carry out their duties. As a policing strategy, police may target enforcement to certain neighbourhoods where particular crimes occur at higher-than-average levels. In some cases, such neighbourhoods may be low-income areas with relatively high proportions of Indigenous and/or racialized residents.

...[T]he reputation of a particular community or the frequency of police contact with its residents does not in any way license police to enter a private residence more readily or intrusively than they would in a community with higher fences or lower rates of crime. Indeed, that a neighbourhood is policed more heavily imparts a responsibility on police officers to be vigilant in respecting the privacy, dignity and equality of its residents who already feel the presence and scrutiny of the state more keenly than their more affluent counterparts in other areas of the city.

– Supreme Court of Canada, *R v Le*, 2019

However, problems can arise when official explanations for deployment decisions are not supported by relevant data.

**Example:** The results of a police race-data collection project showed that racialized drivers were disproportionately subjected to traffic stops. While attempting to explain the results, the chief of police stated that officer deployments were driven by community requests to deal with violent crime, firearm offences and gang activity. In the chief's view, these factors resulted in relatively high numbers of traffic stops in "high-crime" areas. Despite the chief's claim, data showed that of all the persons criminally charged that year, fewer than 5 per cent were charged with serious offences (e.g. homicide, attempted murder, robbery, aggravated assault, pointing or discharging a firearm, etc.). This raised questions about whether the deployment-related traffic stops were actually being conducted in response to serious criminality.

Allocating a high number of police to racialized neighbourhoods raises human rights concerns when (1) this allocation is disproportionate (e.g. heavy-handed) in relation to the level of crime, type of crime and/or form of victimization police seek to address, and (2) residents experience greater degrees of intrusive police scrutiny as a result.

Also, selectively targeting communities based on racial bias, or attempting to prevent crime in racialized neighbourhoods through aggressive<sup>221</sup> or unnecessarily broad approaches, or pretext stops, will likely expose Indigenous or racialized people to higher levels of surveillance, stops and arrests, particularly for minor offences that occur in all neighbourhoods. These deployment practices can lead to Indigenous and racialized people being "over-policed"<sup>222</sup> and may violate the *Code*.

**Example:** A police service has a performance goal of reducing illegal drug activity. Increasing the number of persons charged with drug offences is selected as an indicator of progress toward this goal. Although drug use is not concentrated in any particular part of the city, and although racialized people are no more likely to use

drugs than White people, the police focus their enforcement activities on racialized communities. This contributes to the institutionally approved aim of increasing drug charges.

When a serious crime has taken place and police are deployed in a way that has a disproportionate impact on Indigenous or racialized people, police services may be required to justify the deployment as reasonable and *bona fide* (legitimate). To avoid racial profiling, police responses should be tailored to address specific concerns, and should correspond to the needs the community has identified.<sup>223</sup>

**Example:** Police have information that a human trafficking ring is moving young women to a street in a particular neighbourhood on a specific evening. The neighbourhood's residents are predominantly racialized. Police stop every car entering the street during that time to check on the safety of female drivers and passengers. These stops are not used to check for other types of offences. Although this results in racialized residents being disproportionately stopped, this type of approach is likely not discriminatory. It also appears to be rationally connected to the investigative goal and may be justified as *bona fide* (legitimate).

#### **4.2.2. Proactive or pretext stops**

Some law enforcement organizations have formally or informally adopted a strategy of stopping people proactively. Also known as “officer-initiated activity,” proactive policing typically involves officers using their discretion to scrutinize individuals they encounter while on foot or traffic patrols, as opposed to responding to calls for service. Proactive policing may also involve police asking people questions to gather intelligence.

Although police may proactively stop people and question people short of detaining them, these interactions typically involve broad officer discretion. Courts and the Commission on Systemic Racism in the Ontario Criminal Justice System recognize the negative influence of broad and unguided discretion on racial profiling.<sup>224</sup> Indeed, the Commission recommended that guidelines be created “for the exercise of police discretion to stop and question people, with the goal of eliminating differential treatment of black and other racialized people.”<sup>225</sup> The OHRC has developed guidelines for when an officer may approach an individual in a non-arrest scenario.<sup>226</sup> The OHRC recommends that law enforcement organizations adopt policies and procedures that apply these or similar criteria to prevent racial profiling.

Pretext stops are a primary way that racial profiling occurs.<sup>227</sup> Pretext stops happen when legitimate factors relating to minor offences, such as traffic enforcement, are used as a pretense to conduct a criminal investigation (e.g. a vehicle search). Where race is a factor,

whether consciously or unconsciously, this may be racial profiling. A pretext stop can happen even where a minor offence has been committed.<sup>228</sup> One court stated: “Police officers are not entitled to use highway safety concerns as a [pretext] to investigate other possible criminal offences.”<sup>229</sup>

There have been many cases where police conducted a criminal investigation, following a pretext stop, that led to charges. In these instances, police claimed the driver was stopped because they did not wear a seatbelt,<sup>230</sup> drove erratically,<sup>231</sup> discarded a cigarette<sup>232</sup> or was not a match with the car’s registered owner.<sup>233</sup> In each case, the court found that race was at least one reason for the stop, which led to the person being acquitted.

Another standard practice that may lead to racial profiling is stopping and questioning people who are perceived to be “out of place”<sup>234</sup> and do not “fit in” with the surrounding community demographic.<sup>235</sup> Higher income neighbourhoods tend to be populated by White residents.<sup>236</sup> This, coupled with stereotypes linking Indigenous and racialized people with criminality and poverty, may lead to Indigenous and racialized people in affluent neighbourhoods being more likely to be stopped because they are perceived to be suspicious.<sup>237</sup>

**Example:** Police were assigned to a wealthy neighbourhood to watch for suspects who were male, White, Eastern European and using a vehicle after men matching this description were suspected of cutting telephone lines in the area. Despite this description, the police thought a Black letter carrier was suspicious. The HRTO ruled that the fact that the letter carrier was African Canadian in an affluent neighbourhood was likely the predominant factor, whether consciously or unconsciously, in placing him under surveillance, deciding to stop him and making inquiries about him with others. This was found to be discriminatory.<sup>238</sup>

Racialized and Indigenous peoples may also be treated as “out-of-place” and stopped when they are perceived to be moving outside of expected social and economic racial boundaries. For example, several cases have found racial profiling when Black men were stopped while driving expensive cars.<sup>239</sup>

### **4.2.3. Enforcement incentives and performance targets**

Incentives and performance targets are a standard aspect of police performance management and evaluation that, if properly formulated, are legal and appropriate.

On the other hand, incentives or performance targets (quotas) can tie promotion and career opportunities to quantitative measures of officers’ productivity (e.g. the number of stops, arrests, citations and other enforcement activities). Officers may feel pressure to use their time “efficiently” by relying on stereotypes to categorize people by their presumed

likelihood of being involved in unlawful activity.<sup>240</sup> They may assume they will find more infractions in racialized neighbourhoods, which may be more populous, and where residents may have lower incomes and be more likely to spend time in public places where they are visible to police.<sup>241</sup> Absent careful monitoring of the potential adverse impacts, law enforcement organizations may be tempted to overlook problematic behaviour involved in achieving their targets.<sup>242</sup> For these reasons, such incentives and targets may lead to racial profiling.

#### **4.2.4. Setting priorities that adversely affect Indigenous or racialized people**

Law enforcement organizations are entitled to choose their priorities, allocate their resources, and select the tactics that will work best as long as they abide by the *Code* and other laws. Law enforcement organizations should set priorities based on objective information about risk, and act in ways that reflect necessary and proportionate responses. The priorities of law enforcement authorities may raise concerns about racial profiling if they adversely and disproportionately affect Indigenous or racialized people.

#### **4.2.5. Techniques related to national security or anti-terrorism**

Even when addressing national security threats, approaches to combat terrorism must respect human rights, including the right to be free from discrimination.<sup>243</sup>

While primary responsibility for responding to terrorist incidents remains with federal authorities, police in Ontario also work to prevent and respond to terrorism. Municipal, provincial and federal agencies may conduct joint intelligence operations, share information about potential threats, or share investigation responsibilities. The OHRC's position is that actions by law enforcement bodies covered under provincial jurisdiction must comply with the *Code*, whether these bodies are working alone or in partnership or under the direction of federal agencies.<sup>244</sup>

The definition of terrorist activity in Canada requires that the motive be wholly or in part a political, religious or ideological purpose, objective or cause.<sup>245</sup> However, police cannot target individuals as possible suspects "solely because they hold or express particular views"<sup>246</sup> and must not racially profile when investigating possible suspects.<sup>247</sup> To avoid racial or religious profiling, police should act based on an individual's objectively identifiable actions and statements that are linked to possible criminal activity in specific cases. Racial profiling may happen where law enforcement authorities conduct investigations or share information based on assumptions that an individual is linked to national security concerns due to their real or perceived religion, Indigenous identity, ethnicity or place of origin, etc., and not based on objective evidence of a threat.<sup>248</sup>

Although law enforcement bodies may act on real national security concerns, they should focus on all threats in a way that is necessary and proportionate to the real risk at hand. With a focus on individuals, racial profiling in a national security context can mean Indigenous, racialized or faith communities are treated as potential suspects, and they may be exposed to unwarranted and heightened scrutiny as a result. Conduct that exposes marginalized groups or communities to broad surveillance or over-scrutiny based on race, creed or related assumptions and stereotypes will likely violate the *Code*.

A former Chief of Operations for the United States' CIA Counterterrorism Center criticized the use of racial profiling in the context of counter-terrorism efforts: "It may be intuitive to stereotype people, but profiling is too crude to be effective. I can't think of any examples where profiling has caught a terrorist."<sup>249</sup> In line with this perspective, the British Columbia Supreme Court highlighted expert testimony that "there is no terrorist profile that can accurately predict who will act out on their beliefs about violence and who will not."<sup>250</sup>

Law enforcement authorities may be involved in approaches to prevent terrorism by identifying people they believe are at risk of engaging in future criminal activity. These approaches may have adverse impacts on Indigenous or racialized communities and raise human rights concerns when they:

- Use indicators to identify people that are vague, not valid, inaccurate, culturally-biased, based in stereotypes or could apply to a broad range of law-abiding individuals<sup>251</sup>
- Are not applied to all people, but are selectively applied to people of particular Indigenous, racialized or faith-based groups<sup>252</sup>
- Are used to monitor or gather intelligence on people and start criminal investigations based on race or creed grounds.

**Example:** A federal report on terrorist threats in Canada identified "violent Sunni Islamist ideology" as an instigative source of primary threats facing Canada, while also highlighting Sikh "extremist ideologies" and their adherents as ongoing threats.<sup>253</sup> In response, a national Muslim organization observed that the report's terminology unjustifiably associates Islam with terrorism, obscures the fact that decades have gone by with no terrorist activity by Sikhs in Canada, and downplays the actions of right-wing extremists.<sup>254</sup>

Law enforcement authorities should develop these approaches to prevent and remove any discriminatory bias in their design, application, training, community outreach and accountability mechanisms. To avoid the risk of racial profiling, this should involve:

- Making sure the approach is based on sound, validated social science evidence
- Participants are trained on avoiding the use of stereotypes

- Data is collected and used to evaluate whether the approach has an adverse impact on Indigenous, racialized or faith communities.

#### **4.2.6. Artificial intelligence**

Law enforcement organizations are increasingly using artificial intelligence to identify individuals, collect and analyze data and help make decisions.<sup>255</sup> Tools and approaches developed to predict whether people will pose a risk to others should be designed and applied in a way that relies on transparent, accurate, valid and reliable information about risk. Organizations using artificial intelligence are liable for any adverse impacts based on *Code* grounds, even if the tool, data or analysis is designed, housed or performed by a third party.<sup>256</sup>

There is a danger in using artificial intelligence tools or approaches that are not accurate or are based on racially-biased data. They may overestimate the risk posed by racialized or Indigenous peoples and compound existing disparities in criminal justice outcomes.<sup>257</sup> For example, determining the riskiness of individuals based on the number of times they have been stopped by police, and have therefore become “known to police,” can have a profound and ongoing impact on groups who are most likely to be stopped due to racial profiling.<sup>258</sup> Concerns about risk assessment in the form of predictive policing are detailed below.

##### **4.2.6.1. Risk assessment and predictive policing**

In recent years, law enforcement efforts to prevent crime have begun to employ techniques of predictive policing that involve the use of crime data to determine future probabilities of criminal occurrences. Predictive policing seeks to harness the power of mathematical formulas (known as algorithms) to address two types of risk:

1. Place-based risks related to a broad range of locations that may be sites of criminal activity (e.g. parking lots and garages, late-night entertainment districts, malls, industrial areas, etc.)
2. Person-based risks focused on individuals deemed to have elevated chances of being perpetrators or victims of crime.

The resulting identification of high-risk places or persons guides decisions about how police resources may be deployed. If, for example, elevated risks of car theft are predicted for a well-defined geographical area – sometimes referred to as “targeted microareas”<sup>259</sup> – then police officers will be directed to intensify their patrols of the area with an eye toward deterring car theft or, more ambitiously, apprehending thieves during the commission of their crimes.

In theory, predictive policing is a neutral, objective, bias-free means of addressing crime: a series of crimes occur, the occurrences are documented and transformed into data, the data is inputted to predictive software, and the software generates predictions about where police should focus their efforts. However, in practice, there are many legitimate concerns about predictive policing. While good data, good decisions and appropriate deployment – in full compliance with the *Code* and the *Charter* – can produce positive public safety outcomes, the opposite can happen when predictive policing is used improperly.

#### ***4.2.6.2. Concerns about predictive policing***

There are many concerns about the objectivity of predictive policing and its claim to be an unbiased method of advancing crime control.<sup>260</sup> Core issues speak to problems of data being collected in a biased way, and how police function once they are deployed to particular areas based on predictive technology.

##### **Biased data**

Crime data is shaped by police perspectives and interpretations of which reported incidents qualify as actual crimes. Data does not exist independently waiting to be collected and analyzed by police services. Instead, data is the product of various decision-making processes carried out *by* police.

Data is also shaped by discretionary decisions about who to stop, question and search. Given the reality of racial profiling, these decisions generate racial disparities in arrests and charges for crimes such as drug possession, drug trafficking, possession of stolen goods and so forth. When such data, and other biased data, is fed into predictive software, the results can be profoundly negative for Indigenous and racialized groups. Self-justifying feedback loops and data inputs that correlate with race are two key concerns in this regard.

##### **Self-justifying feedback loops**

Person-based risk assessment inputs can also include data generated as a result of proactive police activity, which in turn can be cited as justifying more of the same activity to the detriment of people who are repeatedly targeted.

**Example:** A police department has a strategy where persons within particular parts of the city – predominantly racialized communities – are designated as risks for involvement in future criminal activity. The strategy is founded on a point-based system where each person on the list is “assigned a point value and given a numerical rank according to that value.” This point system includes “one point for every police contact,” and that contact often takes the form of discretionary stop-and-question practices such as field interviews. More police contacts lead to higher point values,

and higher point values are cited as justifications for more contact, resulting in a “feedback loop” characterized by the ongoing targeting of individuals who are not necessarily engaged in criminal activity.<sup>261</sup>

### **Data inputs that correlate with race**

Although predictive policing does not directly rely on race-based inputs, it is often driven by inputs that correlate with race.<sup>262</sup> Person-based inputs may include being labelled a gang member<sup>263</sup> or gang associate,<sup>264</sup> being socially connected with someone who has been killed by firearm,<sup>265</sup> being the subject of multiple police contacts,<sup>266</sup> and so forth. Notably, none of these inputs qualify as evidence of actual criminal activity and racialized communities facing particular conditions, such as economic marginalization and heavy policing, are most at risk of being deemed risky based on these inputs.

### **Biased police deployment based on predictive policing**

In theory, predictive policing has the capacity to lessen longstanding patterns of biased police deployment in racialized and Indigenous communities. In practice, however, predictive policing has been found to reinforce existing biases.

### **Perpetuating existing biases**

When certain predictive algorithms rely on historical crime data, some of which is generated as a result of racial profiling and aggressive police presences in certain locales, this can lead to reinforcing already existing police biases.

**Example:** A city-level study of place-based predictive policing found that based on public health data, the “estimated rate of drug use is relatively even throughout the city.” But by applying a well-known predictive algorithm to existing police data on drug offences, the researchers showed the algorithm generated hotspot predictions for drug crimes that did not reflect patterns of offending. Instead, the predictions reflected well-established patterns of race-specific targeting, where racialized groups are more likely to be profiled as drug criminals than White people despite roughly equal rates of drug use across ethno-racial groups. As a result, the researchers concluded that “predictive policing is simply reproducing and magnifying the same biases the police have historically held.”<sup>267</sup>

### **Risk assessments based on social networks**

Law enforcement agencies have long histories of formulating crime control strategies based not only on primary targets – those deemed to be actual criminals – but also on secondary targets commonly referred to as associates or affiliates. Data and the predictive modes of policing that it enables have enhanced “the scope and power of the police to designate people as suspects”<sup>268</sup> in ways that are especially impactful on racialized groups.

Social network analysis in the context of predictive policing can be founded on multiple factors including:

- Labelling individuals as gang members based largely on non-legal criteria (e.g. tattoos, accessories, information provided by third-parties, self-admission, etc.),<sup>269</sup> and designating others as gang associates due to their alleged or actual associations with “known gang members”<sup>270</sup>
- Identifying people with social connections to homicide victims as risks worthy of police visits and monitoring<sup>271</sup>
- Creating circles of association consisting of people who have been arrested for particular crimes (arrestees), people who were arrested along with those arrestees (co-arrestees) and people who *at any point in the past* have been arrested with those co-arrestees (co-arrestees of co-arrestees). The result is a “full social network of associates ... extended three levels out,” all of whom are deemed worthy targets for intensive surveillance.<sup>272</sup>

In theory, the social networking dimensions of predictive policing as outlined above can apply to any ethno-racial population segment. In practice, however, members of racialized communities are most likely to be persons of interest within these networks, so much so that one scholar expresses concern about “predictive heat lists’ filled with nothing but poor people of color.”<sup>273</sup>

Bearing these cautions in mind, law enforcement use of predictive policing must be attuned to the dangers of *Code* violations and adverse impacts, and take measures to make sure such dangers do not emerge. As has been recognized in the UK, the speed of “technological innovation and data capabilities pose new ethical, legal and social issues.”<sup>274</sup> Conducting impact assessments of predictive technologies before they are procured and used,<sup>275</sup> and amending or abandoning these technologies if they are found to generate discriminatory outcomes, are two ways that predictive policing can be “tested and monitored for relevant human rights considerations.”<sup>276</sup>

Given that organizations must acknowledge and address potential human rights issues, and not just issues that have fully emerged, it is important for law enforcement entities in Ontario to assess potential *Code*-violating aspects of predictive technologies if and when they decide to adopt them.

## 5. Principles, best practices and recommendations for addressing racial profiling

### 5.1. Principles

Some key principles governing positive change and respect for human rights in law enforcement include:

- **Acknowledgement:** Substantively acknowledging the reality of racial profiling, including the impact it has on individual and community well-being and trust in law enforcement, and recognizing the specific impact on Indigenous peoples and racialized communities and individuals
- **Engagement:** Active and regular engagement with diverse Indigenous and racialized communities to obtain frank and open feedback on the lived experience of racial profiling and effective approaches to combatting it
- **Policy guidance:** Adopting and implementing all appropriate standards, guidelines, policies and strict directives to address and end racial profiling in law enforcement
- **Data collection:** Implementing race data collection and analysis for identifying and reducing disparity, and managing performance
- **Monitoring and accountability:** Regularly monitoring racial profiling, and setting robust internal accountability mechanisms at the governance, management and operational levels
- **Organizational change:** Implementing multi-faceted organizational change (for example, in relation to training, culture, hiring, incentive structures etc.) consistent with the OHRC's guide *Human rights and policing: Creating and sustaining organizational change*
- **Multi-year action plan:** Forming anti-racist action plans featuring initiatives geared toward achieving short- and long-term targets for advancing all of these principles.

### 5.2. Best practices

A number of law enforcement organizations in Canada, the U.K. and the U.S. have taken steps to curtail racial profiling and related concerns.

#### 5.2.1. Acknowledgement and engagement

Bill Closs, former Chief of the Kingston Police Service, presided over the 2003 – 2004 Kingston Police Data Collection Project, marking the first time that a Canadian police service collected race data on stops, reasons for stops and stop outcomes. The study results showed that Indigenous and Black people were disproportionately subjected to stops.<sup>277</sup>

The chief provided ground-breaking leadership by responding to “the need for a proactive order that recognizes the existence of unlawful profiling/bias-based policing and the need to prevent it.”<sup>278</sup> He also stressed the importance of collecting data to gauge whether police services in Canada were engaged in bias-free or bias-based policing,<sup>279</sup> and issued advice to citizens interested in holding police leaders accountable:

“Citizens should be wary of officials who make correct but meaningless statements such as ‘the Code of Conduct under the Ontario *Police Services Act* prohibits police from engaging in any discriminatory behaviour.’ Such a statement is nothing more than an easy way to neutralize [citizens’] concerns, and I would encourage any person who hears a similar comment to ask this question: ‘How many times has this Code of Conduct ever been used to deal with misconduct determined to be racial profiling?’”<sup>280</sup>

### **5.2.2. Policy guidance**

“Simple administrative reforms are possible and effective for those police leaders who seek to reduce racial disparities and build community trust,” according to a detailed study of racial profiling in North Carolina.<sup>281</sup> Data on consent searches of people and property reveal significant disparities, and although a number of cities in North Carolina have written consent forms, with details on the right of citizens to not consent, their use is not mandatory in most cities.

In Fayetteville, however, officers are required to use the forms. This means that an officer seeking to conduct a search must first present the stopped civilian with the form. The civilian can opt to sign or not sign, and if no signature is provided the search is not conducted. Data analysis shows that while searches that do not require consent remain stable, consent searches have declined, crime has not increased, and higher levels of trust have emerged (as measured by citizen-initiated contact with police).<sup>282</sup>

### **5.2.3. Data collection**

Following an April 2012 agreement between the OHRC and the Ottawa Police Services Board, the Ottawa Police Service (OPS) embarked on a project known as the Traffic Stop Race Data Collection Project. From June 2013 to June 2015, Ottawa police officers were required to record the race of every driver (based on officer perceptions of race) they stopped.<sup>283</sup> Based on the collected data, a research team at York University released a report in October 2016 showing that Middle-Eastern and Black drivers were subject to traffic stops at considerably disproportionate rates relative to their presence in the general population.<sup>284</sup>

Since then, the OPS has gone beyond the terms of the agreement by continuing to collect race-based traffic stop data,<sup>285</sup> a commitment that makes the OPS a leader among Canadian

police services in the domain of race-data collection. Additionally, the OPS will supplement data collection by engaging in data analysis and public reporting, all of which is intended to support the OPS Multi-Year Action Plan for Bias-Neutral Policing.<sup>286</sup>

#### **5.2.4. Monitoring and accountability**

Although commonly thought of in hierarchical top-down terms, accountability in law enforcement can take multiple forms including peer-based accountability. In New Orleans, a city where two-thirds of the population is racialized or Indigenous, the New Orleans Police Department has implemented EPIC (Ethical Policing is Courageous) in recognition of the degree that “the community and the department clearly benefit when mistakes and misconduct are prevented.”<sup>287</sup>

Practiced throughout the department, EPIC encourages front-line officers to intervene, on a peer-to-peer basis, to prevent incidents of unlawful use of force and other abuses of power.<sup>288</sup> Promising results include substantial declines in citizen complaints, increased community satisfaction with the police department, and the use of body camera footage – featuring real-life instances of peer intervention – for officer training.<sup>289</sup>

#### **5.2.5. Organizational change**

For decades, California’s Richmond Police Department had a “reputation of racism and ruthlessness.” But under the leadership of Chief Chris Magnus, from 2006 – 2016, the department’s culture underwent a substantial shift.

Magnus emphasized community policing and developing collaborative police/community relations, eliminated street units that were driven by the goal of producing high arrest figures, and scheduled regular proactive use of force reviews for supervisors: “Each tackle of a fleeing suspect, arm-twist and kick was up for scrutiny, though none had prompted complaints.” In addition to a seven-year period with no police killings of civilians, Richmond also experienced a sharp reduction in homicides and Chief Magnus gained national recognition for his transformative efforts.<sup>290</sup>

## 6. Recommendations

The OHRC has made many recommendations over many years to address racial profiling. Recommendations have also been made by a wide variety of agencies, organizations and researchers in Canada, the U.K. and the U.S.

The OHRC makes the following recommendations for consideration by law enforcement agencies and other institutions that are committed to combating racial profiling and related problems.

### 6.1. To the Government of Ontario

#### **Acknowledgement**

1. Acknowledge racial profiling as a reality in the domain of law enforcement that violates the *Police Services Act*, the *Comprehensive Ontario Police Services Act, 2019*, the *Code*, and/or the *Charter* (depending on the law enforcement entity), and that has specific impacts on Indigenous peoples and racialized communities.

#### **Engagement**

2. Meaningfully engage and work closely with Indigenous peoples and racialized communities to understand the concerns and issues they face in the context of law enforcement; and work with the federal government to develop a clear action plan with detailed timelines to address these concerns.

#### **Policy guidance**

3. Adopt and implement all appropriate standards, guidelines, policies and strict directives to address and end racial profiling and racial discrimination in policing, including, but not limited to:
  - a. A clear definition of racial profiling that is consistent with the *Human Rights Code*
  - b. Criteria for when an officer may approach an individual in a non-arrest scenario, and criteria for what may not form a basis for an officer approach
  - c. An appropriate framework for rights notification
  - d. An explicit prohibition on using race in suspect, victim or witness selection, unless the police are dealing with a sufficiently specific description.

#### **Data collection**

4. Require police services to establish permanent data collection and retention systems to record human rights-based data on stops and searches of civilians; all use of force incidents; and charges and arrests. The data should be standardized, disaggregated, tabulated and publicly reported by each police service.

**Monitoring and accountability**

5. Require independent, arms-length and public monitoring of police services and police services boards regarding racial profiling through, for example, periodic audits; inspections of policies, procedures, training, databases and records; and public reporting.
6. Expressly provide police disciplinary tribunals with the jurisdiction to allow intervention by a non-party as a “friend of the court” in officer misconduct hearings.
7. Direct police services boards to measure and evaluate police service performance on racial profiling, take corrective action to address systemic discrimination, and provide clear and transparent information to the public on racial profiling.
8. Drawing on best practices from other jurisdictions, implement a Crown pre-charge screening process, including related changes to the Crown Prosecution Manual, to address over-charging and racial profiling.

**Organizational change**

9. Require regular, detailed and ongoing human rights-focused training, developed in consultation with affected groups, on racial profiling, unconscious bias and related topics for new recruits, current officers, investigators and supervisors. Police officers should be required to take human rights training at least every three years.
10. Introduce a substantive segment on under-policing (its causes, manifestations and remedies) in the Ontario Police College curriculum, with a particular focus on the impacts of under-policing on Indigenous communities.
11. Commission an independent, anti-racism-focused review of the provincial use of force model, make the result public, and commit to implementing any recommendations. The review should consider, among other things:
  - a. How bias or stereotypes about racialized people may enter into decision-making processes
  - b. The importance of employing de-escalation techniques and tactics, whenever possible, to minimize the need to use force and increase the likelihood of voluntary compliance with legitimate and lawful orders.<sup>291</sup>
12. Ensure, through adequate funding, that all First Nations police services have Major Case Management capacities.

## 6.2. To police services boards

### **Acknowledgment**

13. Acknowledge racial profiling as a reality in the domain of law enforcement that violates the *Police Services Act*, the *Comprehensive Ontario Police Services Act, 2019*, the *Code*, the *Charter*, and that has specific impacts on Indigenous peoples and racialized communities.

### **Engagement**

14. Form an advisory group consisting of local defence counsel, with extensive experience representing Indigenous and/or racialized clients, who can meet with the Board twice per year to discuss issues of racial profiling and propose appropriate counteractive measures.

### **Policy guidance**

15. Work with an independent expert to develop a police board policy on racial profiling that includes a clear definition of racial profiling that is consistent with the *Code* and incorporates these recommendations.

### **Monitoring and accountability**

16. Retain an Independent Monitor to enhance oversight and accountability regarding racial profiling by producing publicly available annual outcome assessments that include:
  - a. Consultation with Indigenous and racialized communities
  - b. Analysis of whether traffic stops, pedestrian stops, charges, arrests and use of force have a disparate impact on Indigenous and racialized individuals
  - c. Evaluations of strategies designed to reduce racial profiling, including data collection systems, accountability mechanisms, training, policies and procedures
  - d. Recommendations on any necessary modifications to data collection systems, accountability mechanisms, training, and policies and procedures in light of consultative, analytical and evaluative findings.

### **Organizational change**

17. Emphasize anti-racism and knowledge of human rights, including racial profiling, as a core competency for police chiefs and deputy chiefs, and make hiring and renewal decisions based, in part, on this core competency as determined by:
  - a. The results of race data analysis
  - b. Steps taken to reduce identified disparities
  - c. Disciplinary responses to incidents of racial profiling
  - d. Consultations with members of Indigenous peoples and racialized communities.
18. Grant awards and recognition to service members who, in the course of their professional and community-based work, exhibit and exemplify anti-racist principles and practices.

## 6.3. To police services

### Procedures

19. Work with an independent expert to develop police service procedures on racial profiling that include a clear definition of racial profiling that is consistent with the *Human Rights Code* and incorporate these recommendations.

### Data collection

20. Develop and implement a permanent system to record and analyze race-based data on stops, searches, charges and arrests.

21. Collect detailed data on traffic stops, including the following information:

- Date (day, month, year)
- Time
- Location (smallest police-defined geographical unit and GIS coordinates)
- Officer information (name, race, gender, years of service, ID number, rank, shift, assignment, platoon, unit and division)
- Reason for the stop
- Civilian information (race, Indigenous ancestry, gender, age, the role of the civilian (driver, passenger), whether the civilian was asked to produce ID, name and home address)
- Action taken as a result of the stop (ticket, caution, arrest, no action)
- Search activity (of vehicle, driver and/or passengers)
- Reason for search
- Search results (weapons, drugs, other contraband, nothing)
- Additional comments/observations.

22. Collect detailed data on pedestrian stops, including the following information:

- Date (day, month, year)
- Time
- Location (smallest police-defined geographical unit and GIS coordinates)
- Officer information (name, race, gender, years of service, ID number, rank, shift, assignment, platoon, unit, and division)
- Reason for the stop
- Pedestrian information (race, Indigenous ancestry, gender, age, whether the civilian was asked to produce ID, name and home address)
- Action taken as a result of the stop (caution, street check, arrest, no action)
- Search activity
- Reason for search
- Search results (weapons, drugs, other contraband, nothing)
- Additional comments/observations.

23. Collect data and report on the age, gender and racial identity of drivers ticketed for non-moving offences (e.g. driving under suspension, driving without insurance, etc.) that are uncovered by officers as a result of (i) conventional patrol activity, (ii) collision investigations and (iii) license plate scanning technology.
24. Publically release data annually in a way that allows for meaningful analysis of how stops, searches, charges, arrests and force are used on, and affect, Indigenous peoples, and Black and other racialized people.
25. Analyze race-based data on stops, searches, charges, arrests and use of force to detect racial disproportionalities and disparities, and determine if they can be reduced.
  - a. Perform internal benchmarking analysis to ascertain the degree that individual officer traffic and pedestrian stops and stop outcomes compared to the overall performance of their assigned unit.
26. Require all senior managers and data specialists to undergo training on Ontario's *Data Standards for the Identification and Monitoring of Systemic Racism*.

### **Policy guidance**

#### *Quotas:*

27. Prohibit quotas, whether formal or informal, for ticketing, charges, arrests or stop and question activities.
28. Work with government to implement a Crown pre-charge screening process to address overcharging and racial profiling.

#### *Body-worn cameras:*

29. Require all uniform and front-line officers to wear body-worn cameras.
30. Develop appropriate privacy guidelines for the use of body-worn cameras in consultation with the Information and Privacy Commissioner of Ontario.

#### *Use of force:*

31. Create and maintain a reliable and accurate electronic system to track all data about use of force, including:
  - a. Race, Indigenous ancestry, age and gender of the subject
  - b. Whether the subject had or was perceived to have a mental health disability, was experiencing a mental health crisis or was intoxicated on drugs or alcohol at the time of incident
  - c. All type(s) and levels of force used and their sequence

- d. Name, gender, rank, badge number, years of experience, shift, assignment, platoon, unit and division of the officer(s) who used force
  - e. Location where the use of force occurred, including postal code, patrol zone and X-Y coordinates
  - f. Location where the subject lived, including postal code and patrol zone
  - g. Any injuries sustained by the officer and/or the subject and medical services received
  - h. A detailed description of the circumstances and the subject's actions that led to the use of force including:
    - i. The reason for the initial stop or enforcement action
    - ii. Whether the incident occurred during an officer-initiated contact or a call for service
    - iii. Whether the subject was in possession of a weapon, the type of weapon and when the weapon emerged (i.e. before use of force or after arrest)
    - iv. Whether the subject was handcuffed or otherwise restrained during the use of force
      - i. Whether the subject was charged with an offence, and if so, which offence(s) and their disposition
      - j. Whether, when and how verbal or other de-escalation techniques were employed
      - k. For firearms-related incidents, the number of shots fired by each involved officer and the accuracy of the shots
      - l. The length of time between the use of force and the completion of each step of the force investigation and review.
32. Supervisors should thoroughly review use of force incidents (including all of the above data and any video from body-worn or in-car cameras) immediately after the incident takes place, to determine if there were credible non-discriminatory explanations for use of force. These reviews should be documented.
33. Require that officers use de-escalation techniques and tactics, whenever possible, to minimize the need to use force and increase the likelihood of voluntary compliance with legitimate and lawful orders.
34. Develop a system of zero tolerance for use of force as punishment or retaliation rather than as a necessary and proportionate response to counter a threat.

### **Monitoring and accountability**

#### *Early Intervention System, professional standards and discipline*

35. Work with external experts to develop an Early Intervention System (EIS) that captures all necessary information to alert supervisors to potential racial discrimination by both

individuals and platoons/units/divisions. This system should capture and flag patterns related to racial disproportionalities and disparities, including in:

- a. All uses of force, broken down by level and type
- b. All stops of civilians
- c. Charges and arrests.

36. The Early Intervention System should also capture:

- a. Violations of the body-worn and in-car camera procedures
- b. All instances where the police service learns that:
  - i. A decision not to prosecute any charge or ticket was based on the Crown Attorney's concerns about an officer's credibility
  - ii. A court or tribunal has made a negative credibility determination about an officer
  - iii. A court or tribunal has concluded that race was a factor in an officer's conduct
  - iv. A motion to suppress evidence was granted on the grounds of a *Charter* violation by an officer
- c. All internal and external misconduct complaints that allege racial discrimination, including their disposition
- d. All civil, human rights or administrative claims that allege racial discrimination filed with or against the police service, the chief or the police services board that result from the actions of officers
- e. All disciplinary action taken against officers for racial discrimination
- f. All non-disciplinary corrective action required of officers for racial discrimination.

37. Establish and implement EIS performance indicators that will trigger supervisory review and referrals to professional standards.

38. Ensure that command staff and other supervisors regularly review EIS data to evaluate performance of officers across all divisions, platoons, units, shifts and ranks.

39. Ensure that front-line supervisors review EIS data for all officers under their direct command at least monthly, and that supervisors review broader, pattern-based reports at least quarterly.

40. Develop EIS indicators for supervisors based on the EIS performance for their unit. Compliance with the requirement for regular review of EIS data for all officers under their direct command should be a performance requirement for all front-line supervisors.

41. Ensure that supervisors, at least four times per year, conduct both systematic and random audits of the body-worn and in-car camera recordings of officers under their command, to assess whether the officers are providing a service environment free of racial discrimination.

42. Take remedial action, including, but not limited to, additional training, reassignment, counselling, heightened monitoring, and heightened supervision, when an officer is flagged based on EIS performance indicators or audits of the body-worn and in-car camera recordings of officers.
43. Officers should be disciplined, up to and including dismissal, when officer behaviour is found to be consistent with racial discrimination.
44. Supervisors should be held accountable for officer behaviour found to be consistent with racial discrimination.
45. Performance criteria should be reviewed annually to make sure that racial profiling is not being institutionally incentivized.
46. Make performance criteria – for officers and supervisors – publicly available online along with any quantitative measures associated with performance reviews.
47. Produce and review an annual list of all recognized instances of racial profiling committed by police officers, along with details on what disciplinary action, if any, was taken in response to these incidents.

### **Organizational change**

48. Provide regular, detailed and ongoing human rights-focused training, developed in consultation with affected groups, to new recruits, current officers, investigators and supervisors on:
  - a. Racial profiling, racial discrimination and unconscious/implicit bias
  - b. The importance of police legitimacy and how it is affected by racial profiling, racial discrimination and unconscious/implicit bias
  - c. The protection of human rights as central to the police mandate and essential to effective policing (per the *Police Services Act* and the *Comprehensive Ontario Police Services Act, 2019*)
  - d. The use of force continuum with an emphasis on verbal communication and de-escalation
  - e. How to tolerate verbal abuse and disrespect (including allegations of racism or bias) from civilians without resorting to physical force
  - f. How to recognize and deal with fears, anxieties or biases that may contribute to their use of force decisions
  - g. The nature of racism, including its particular impact on Black and Indigenous communities
  - h. How racial profiling and racial discrimination violate the *Code, Charter, Police Services Act* and *Comprehensive Ontario Police Services Act, 2019*, with references to relevant case law

- i. The principles that apply to claims of racial discrimination, such as how intent is not required.
- 49. Training should include an attitudinal component using scenario-driven learning modules to facilitate the identification of racial profiling and racial discrimination in investigations, including scenarios dealing with suspect selection, detention, searches, charges, arrests, and conflict de-escalation.
- 50. Training should be evaluated on an ongoing basis. Officers must pass training or demonstrate that lessons have been absorbed and retained.
- 51. Post daily online information on criminal incidents (excluding those occurring in domestic settings) reported to police with information on the nature of the incident, the time and location of the incident, and the case number. Individuals who are stopped for specific investigative reasons (e.g. “there was a robbery in the area”) should be told how they can access this information so they can independently confirm the reason for the stop.
- 52. Make Bimickaway training (comprehensive Indigenous cultural competency) mandatory for all service members.
- 53. Require Victim Liaison Officers to have knowledge, skills and abilities that are informed by the needs and expectations of Indigenous and racialized communities, and evaluate officer performance based, in part, on this criterion.

## **6.4. Recommendations to police oversight agencies**

### **Data collection**

- 54. Collect demographic data on mandate-related matters and consult with an advisory committee on best practices on collecting, managing and analyzing relevant demographic data.

### **Monitoring and accountability**

- 55. Implement an anti-racist approach to service delivery, and develop an ongoing audit process to assess the implementation and effectiveness of anti-racism and organizational change.

**Organizational change**

- 56. Develop and deliver mandatory anti-racism programs for staff, in partnership with Indigenous and racialized community organizations.
- 57. Implement ongoing recruitment and development of people from under-represented communities.
- 58. Incorporate anti-racism measures into recruitment, training, education and evaluation of investigators.

**6.5. Recommendations to other law enforcement entities**

- 59. Take steps to monitor for and prevent racial profiling, and develop or modify policies, practices, training and public relations activities in this regard.
- 60. Organizations or institutions that may have a problem with racial profiling should undertake measures to improve recruitment, retention and promotion of employees who are members of Indigenous and racialized groups.
- 61. Organizations or institutions that may have a problem with racial profiling should provide new staff with sufficient support to make sure they learn appropriate practices and do not resort to racial profiling due to the stresses of the job.
- 62. Organizations or institutions that may have a problem with racial profiling should study and implement the best practices of other, similarly-situated organizations.

## Appendix A: Police oversight agencies in Ontario

**Table 1: Police oversight agencies under the *Police Services Act*<sup>292</sup>**

	<b>Office of the Independent Police Review Director (OIPRD)</b>	<b>Ontario Civilian Police Commission (OCPC)</b>	<b>Special Investigations Unit (SIU)</b>
<b>Jurisdiction</b>	<p>The OIPRD has a mandate to receive, manage and oversee public complaints about police. Complaints can involve:<sup>293</sup></p> <ul style="list-style-type: none"> <li>• The conduct of a police officer</li> <li>• The policies of a police service</li> <li>• The services provided by a police service.</li> </ul> <p>The OIPRD also has a mandate to conduct systemic reviews that “are the subject of, or that give rise to” public complaints.<sup>294</sup></p> <p>The purpose of a systemic review is “to determine whether systemic failings have occurred, to make recommendations to address those failings and to help restore and enhance public confidence in police and policing.”<sup>295</sup></p>	<p>The OCPC primarily hears appeals of police disciplinary decisions.<sup>296</sup> It also has a mandate to, among other things:</p> <ul style="list-style-type: none"> <li>• Investigate, inquire and report on certain policing matters, including the conduct of police officers and police services board members<sup>297</sup></li> <li>• Investigate, at the direction of the Lieutenant Governor in Council, any matter relating to crime or law enforcement<sup>298</sup></li> <li>• Direct municipal police services and police services boards to comply with prescribed standards of police services, and imposing sanctions for failing to comply with these standards<sup>299</sup></li> <li>• Direct internal complaints about the conduct of a police officer.<sup>300</sup></li> </ul>	<p>The SIU has a mandate to conduct investigations into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers, including allegations of sexual assault.<sup>301</sup></p>
<b>Powers</b>	<p>If an officer conduct complaint is made to the OIPRD that the OIPRD has decided to deal with, the OIPRD may:</p> <ul style="list-style-type: none"> <li>• Refer it to the chief of police of the police</li> </ul>	<p>If, after holding a hearing, the OCPC is of the opinion that a board or police service has “flagrantly or repeatedly failed to comply with prescribed standards of police</p>	<p>The SIU has the power to lay criminal charges if there are reasonable grounds to do so.<sup>307</sup></p>

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	<p>service the complaint relates to for investigation</p> <ul style="list-style-type: none"> <li>• Refer it to the chief of a police service other than the police service the complaint relates to for investigation;</li> <li>• Retain it for investigation.<sup>302</sup></li> </ul> <p>Officer conduct complaints investigated by the OIPRD that are substantiated as “serious” by the OIPRD or the chief of police must proceed to a disciplinary hearing.<sup>303</sup> Adjudication and prosecution is provided by the police service.<sup>304</sup></p>	<p>services,” the OCPC may:<sup>305</sup></p> <ul style="list-style-type: none"> <li>• Suspend the chief of police, one or more members of the board, or the whole board, for a specified period</li> <li>• Remove the chief of police, one or more members of the board, or the whole board from office</li> <li>• Disband the police service and require the Ontario Provincial Police to provide police services for the municipality, and/or</li> <li>• Appoint an administrator to “perform specified functions with respect to police matters in the municipality for a specified period.”</li> </ul> <p>The OCPC is not required to hold a hearing where the circumstances constitute an “emergency.”<sup>306</sup></p>	
<p><b>Public complaints</b></p>	<p>Public complaints about officer conduct may be filed directly by, among other people, affected individuals and witnesses.<sup>308</sup></p>	<p>The OCPC will consider public complaints about the misconduct of a chief of police, police board members, auxiliary members of a police service, municipal law enforcement officers and/or special constables.<sup>309</sup></p>	<p>Chiefs of police are required to notify the SIU immediately of an incident involving their police officers that “may reasonably be considered to fall within the investigative mandate of the SIU.”<sup>310</sup></p> <p>However, anyone else (e.g. member of the public, coroner, member, lawyer, etc.) may advise the SIU of a situation they believe may require investigation.<sup>311</sup></p>

**Table 2: Comprehensive Ontario Police Services Act, 2019<sup>312</sup>**

	<b>Law Enforcement Complaints Agency (LECA)</b>	<b>Ontario Civilian Police Commission (OCPC)</b>	<b>Special Investigations Unit (SIU)</b>	<b>Inspector General</b>
<b>Jurisdiction</b>	<p><i>COPS</i> continues the OIPRD as the Law Enforcement Complaints Agency (LECA).</p> <p>Unlike the OIPRD, LECA can conduct a systemic review without a public complaint, where there are issues of a systemic nature that “may contribute or are otherwise related to misconduct.”<sup>313</sup> Furthermore, LECA can investigate the conduct of a police officer without a public complaint if the Complaints Director determines it is in the public interest.<sup>314</sup> This includes notice of possible misconduct from the SIU or Inspector General, or whether a “decision to not conduct or continue an investigation would negatively impact public confidence in policing.”<sup>315</sup></p>	<p>The OCPC is continued, until regulations provide for its dissolution, to complete any hearings or appeals under the <i>Police Services Act</i> that were initiated before the <i>Police Services Act</i> is repealed and that were not finally determined as of that day.<sup>316</sup></p>	<p>Same as under the <i>Police Services Act</i>.</p>	<p><i>COPS</i> creates the Inspector General of Policing, who, among other things:<sup>317</sup></p> <ol style="list-style-type: none"> <li>1. Monitors and conducts inspections of police services boards, chiefs of police, and police services to ensure they comply with <i>COPS</i> and regulations</li> <li>2. Monitors and conducts inspections of police services board members to ensure they do not commit misconduct</li> <li>3. Deals with complaints about the adequacy and effectiveness of policing under <i>COPS</i> or its regulations, including policing provided by police services</li> <li>4. Deals with complaints about the failure of a board, chief of police or police service to comply with <i>COPS</i> or its regulations, “other than misconduct,</li> </ol>

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				<p>including a systemic failure.”</p> <p>5. Deals with complaints about the policies of a police services board or the procedures of a chief of police.</p> <p>The Inspector General may not conduct inspections of police officers to determine if they have engaged in misconduct.<sup>318</sup></p>
<b>Powers</b>	<p>Same as under the <i>Police Services Act</i>.</p> <p>Adjudication independent of the police service is only provided if the Complaints Director or chief of police believe that demotion or termination would be the appropriate disciplinary measure. They may apply to the Commission Chair of the Arbitration and Adjudication Commission for a hearing.<sup>319</sup> A party to this hearing may appeal the adjudicator’s decision to the Divisional Court within 30 days of receiving notice of that decision.<sup>320</sup></p>	<p>Same as under the <i>Police Services Act</i> until the OCPC’s dissolution.</p>	<p>The SIU has the power to lay criminal charges if there are reasonable grounds to do so.<sup>321</sup></p> <p>The SIU must notify the Complaints Director of officer conduct that may constitute misconduct that is uncovered during SIU investigations.<sup>322</sup></p>	<p>If the Inspector General believes an inspector’s report “disclosed evidence” that a board member committed misconduct, the Inspector General may reprimand, suspend or remove the member from the board.<sup>323</sup> Before doing so, the Inspector General must provide written notice to the member and the board and provide them with an opportunity to respond.<sup>324</sup></p> <p>If the Inspector General believes an inspector’s report “discloses evidence of non-compliance with a requirement of this Act or the regulations, or evidence that an act or omission will likely result in non-compliance,” the</p>

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				<p>Inspector General may issue any directions to a police services board or chief of police that the Inspector General considers advisable to remedy or prevent the non-compliance.<sup>325</sup> This does not apply to non-compliance or potential non-compliance that constitutes misconduct.<sup>326</sup></p> <p>If the subject of the direction does not comply with the direction, the Inspector General may suspend the chief of police or board members for a specified period, or remove them from office, appoint an administrator, disband the police services board or disband the police service.<sup>327</sup> Again, before doing so, the Inspector General must provide written notice to the affected person or body and provide them an opportunity to respond.<sup>328</sup> Notice does not need to be provided if the Inspector General believes that an emergency exists and that an interim measure is necessary to "ensure adequate, effective policing."<sup>329</sup></p>
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<p><b>Public complaints</b></p>	<p>Same as under the <i>Police Services Act</i>.</p>	<p>Same as under the <i>Police Services Act</i> until the OCPC's dissolution.</p>	<p>Schedule 5 of COPS, the <i>Special Investigations Unit Act, 2019</i>, provides some exceptions to the duty of a chief of police to provide notice to the SIU of an incident involving the death or serious injury of a person. The <i>Special Investigations Unit Act, 2019</i>, only requires the chief of police to provide notice if one of four conditions are met: "(i) if the official used force against the affected person, (ii) if the affected person was detained by or in the custody of the official, (iii) if the affected person was involved in a motor vehicle accident involving the official or pursuit by the official, OR (iv) in any other circumstance in which the designated authority reasonably believes that the official's conduct may have been a contributing factor in the incident."<sup>330</sup></p>	<p>Any person who believes that a member of a police services board has committed misconduct may make a complaint to the Inspector General.<sup>333</sup></p> <p>Any person may make a complaint to the Inspector General about, among other things.<sup>334</sup></p> <ol style="list-style-type: none"> <li>1. The adequacy and effectiveness of policing under COPS or its regulations, including policing provided by police services</li> <li>2. The failure of a board, chief of police or police service to comply with COPS or its regulations, "other than misconduct, including a systemic failure"</li> <li>3. The policies of a police services board</li> <li>4. The procedures established by a chief of police.</li> </ol>
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			<p>However, the SIU Director has the power to make preliminary inquiries to determine if an investigation is necessary, even in the absence of notice from the chief of police.<sup>331</sup></p> <p>Anyone (e.g. member of the public, coroner, member, lawyer, etc.) may advise the SIU of a situation they believe may require investigation.<sup>332</sup></p>	
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### **Limitations of accountability for discrimination in police services, including racial profiling**

Under the *Police Services Act*, there is a lack of independence in the public complaints system, which limits accountability for discrimination. The OIPRD relies on police services themselves to conduct most investigations,<sup>335</sup> and the police service also provides prosecution and adjudication. However, under *COPS*, there is somewhat more independence in cases that may involve demotion or termination, or where the officer does not consent to discipline short of demotion or termination.

Also, the recommendations of the OIPRD and LECA from systemic reviews are not enforceable, and their mandates are largely complaint-driven. Discrimination under the *Code* is only one form of misconduct that can give rise to a public complaint insofar as it is a subset of discreditable conduct.

The OCPC primarily hears appeals. There is no publicly available information to indicate that the OCPC has used its investigation and inquiry powers to address discrimination in policing, except for the *Thunder Bay Police Services Board Investigation: Final Report*.<sup>336</sup>

Overall, there is greater potential for discrimination in policing, including racial profiling, to be addressed by police oversight agencies under *COPS*. This is because LECA can conduct a systemic review without a public complaint and investigate officer misconduct, including discrimination, without a public complaint. Further, the SIU is required to notify the Complaints Director of officer conduct that may constitute misconduct, including discrimination, that is uncovered during SIU investigations.

## **Appendix B: Glossary of terms**

**Black people:** People who are African descended (for example, African-Canadian, African-Caribbean, continental African, etc.).

**Citizenship:** Under the *Code*, individuals are entitled to equal treatment without discrimination because of citizenship. This ground covers distinctions between Canadian citizens, citizens from other countries, persons with dual citizenship, landed immigrants or permanent residents, refugees and non-permanent residents.

**Criminal profiling:** Forming profiles based on systemic analysis of associations between serious crimes and the physical, behavioural and/or psychological characteristics of individuals who have committed, or may commit, such crimes.

**Indigenous peoples:** A collective name for the original people of North America and their descendants. Indigenous peoples of Canada include First Nations, Métis and Inuit peoples. They are recognized as many different nations with unique heritages, languages, cultural practices and spiritual beliefs.

**Non-status migrant:** A person who has entered and/or remains in Canada without the permission of the federal government.<sup>337</sup>

**Proactive policing:** Proactive or officer-initiated policing refers to patrol strategies used by police to address crime, disorder and other matters deemed to be problematic. It involves a set of practices that are beyond simply responding to and investigating crime, where law enforcement officers are “actively searching for violations, suspicious individuals, and suspicious behaviour.”

**Race:** The *Code* prohibits discrimination and harassment based on this ground, among others. Rather than being a biological reality, “race” is socially constructed to create differences among groups with the effect of marginalizing some people in society. In addition to race, the *Code* prohibits discrimination on several related grounds: colour, ethnic origin, ancestry, place of origin, citizenship and creed (religion).

**Racialization:** The “process by which societies construct races as real, different and unequal in ways that matter to economic, social and political life.”<sup>338</sup> Racialization extends to people in general but also to specific traits and attributes, which are connected in some way to racialized people and are deemed to be “abnormal” and of less worth. Individuals may have prejudices related to various racialized characteristics such as accents, modes of personal expression, religion, etc.

**Racialized people:** In this policy we use the term “racialized people” to refer to people who are not Indigenous or White. This is a preferred term as it expresses race as a social construct rather than a description of people based on perceived characteristics (such as “people of colour”).

**Racial profiling:** Any act or omission related to actual or claimed reasons of safety, security or public protection, by an organization or individual in a position of authority, that results in greater scrutiny, lesser scrutiny or other negative treatment based on race, colour, ethnic origin, ancestry, religion, place of origin or related stereotypes.

**Suspect descriptions:** A set of characteristics – such as height, build, perceived age, perceived race, etc. – associated with an individual or individuals who have committed a crime and who have yet to be apprehended.

**Racial under-policing:** The failure to take appropriate action to protect the safety or security of an individual or group of people based on race, colour, ethnic origin, ancestry, religion, place of origin or related stereotypes, rather than proper investigations or preventative actions.

## Endnotes

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<sup>1</sup> *Peart v Peel Regional Police Services*, [2006] OJ No 4457 (QL) at paras 96, 93; 2006 CanLII 37566 (ON CA) [*Peart*].

<sup>2</sup> See the Glossary of Terms for a definition.

<sup>3</sup> See, for example, *Peart*, *supra* note 1; *Nassiah v Peel (Regional Municipality) Services Board*, 2007 HRTO 14 (CanLII) at para 113; 61 CHRR 88 [*Nassiah*]; also, in a decision issued in May 2019, the Supreme Court of Canada stated: “Research studies have established that racial minorities are both treated differently by the police and that such differential treatment does not go unnoticed by them. We have arrived at a place where the research now shows disproportionate policing of racialized and low-income communities,” see *R v Le*, 2019 SCC 34 at para 97; [2019] SCJ No 34 (QL) [*Le*].

<sup>4</sup> Ontario Human Rights Commission, *Under Suspicion: Research and consultation report on racial profiling in Ontario* (Toronto: Queen’s Printer for Ontario, 2017) at 30–80, online: *Ontario Human Rights Commission* [www.ohrc.on.ca/en/under-suspicion-research-and-consultation-report-racial-profiling-ontario](http://www.ohrc.on.ca/en/under-suspicion-research-and-consultation-report-racial-profiling-ontario) [*Under Suspicion*].

<sup>5</sup> Ontario Human Rights Commission, *Paying the Price: The human cost of racial profiling* (Toronto: Queen’s Printer for Ontario, 2003), online: *Ontario Human Rights Commission* [www.ohrc.on.ca/en/paying-price-human-cost-racial-profiling](http://www.ohrc.on.ca/en/paying-price-human-cost-racial-profiling) [*Paying the Price*].

<sup>6</sup> *Under Suspicion*, *supra* note 4.

<sup>7</sup> Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (Toronto: Ontario Human Rights Commission, 2018), online: *Ontario Human Rights Commission* [www.ohrc.on.ca/en/public-interest-inquiry-racial-profiling-and-discrimination-toronto-police-service/collective-impact-interim-report-inquiry-racial-profiling-and-racial-discrimination-black](http://www.ohrc.on.ca/en/public-interest-inquiry-racial-profiling-and-discrimination-toronto-police-service/collective-impact-interim-report-inquiry-racial-profiling-and-racial-discrimination-black) [*A Collective Impact*].

<sup>8</sup> The Code also prohibits discrimination in employment, accommodation (housing), contracts, and membership in unions and vocational associations.

<sup>9</sup> *Commission des droits de la personne et des droits de la jeunesse (Rezko) c Montréal (Service de police de la ville de) (SPVM)*, 2012 QCTDP 5 (CanLII) at para 178; [2012] JTDPQ No 5 [*Rezko*]; a similar form of reasoning informs police classifications of hate crimes: “victims of hate crimes targeting specific populations are not necessarily members of those specific populations. For example, if someone is assaulted and there is anti-Muslim language, the hate crime will be considered anti-Muslim whether or not the victim is Muslim. The hate crime is classified by the perception of the accused, not by the victim’s characteristics,” see Statistics Canada, *Police-Reported Hate Crime in Canada, 2017*, by Amelia Armstrong, The Canadian Centre for Justice Statistics, Catalogue No 85-002-X (Ottawa: Statistics Canada, 30 April 2019) at 5, online: *Statistics Canada* <https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00008-eng.htm> [*Police-Reported Hate Crime in Canada*].

<sup>10</sup> *R v Buhay*, 2003 SCC 30 (CanLII) at paras 25–26, [2003] 1 SCR 631 [*Buhay*].

<sup>11</sup> *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

<sup>12</sup> *Ibid*, s 7.

<sup>13</sup> *Ibid*, s 8.

<sup>14</sup> *Ibid*, s 9.

<sup>15</sup> *Ibid*, s 10.

<sup>16</sup> *Nassiah*, *supra* note 3 at para 112.

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- <sup>17</sup> *R v Neyazi*, 2014 ONSC 6838 (CanLII) at paras 170–77 [*Neyazi*]; *R v Laforme and Martin*, 2014 ONSC 1457 (CanLII) at para 173, [2014] OJ No 1098 (QL) [*Laforme and Martin*].
- <sup>18</sup> *Neyazi*, *ibid*; *Laforme and Martin*, *ibid*; *Le*, *supra* note 3 at paras 73, 78.
- <sup>19</sup> *R v Dudhi*, 2019 ONCA 665 at paras 61–63 [*Dudhi*]; *Le*, *supra* note 3 at para 78; *R v Lam*, 2014 ONSC 3538 (CanLII) at para 181 [*Lam*].
- <sup>20</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 at art 7 [*UDHR*].
- <sup>21</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 26 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].
- <sup>22</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195, Preamble (entered into force 4 January 1969, accession by Canada 14 October 1970) [*ICERD*].
- <sup>23</sup> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 70, 1999 CanLII 699 (SCC) [*Baker*]; *R v Hape*, [2007] 2 SCR 292 at para 53, 2007 SCC 26 (CanLII) [*Hape*]; see also *R v Partak*, [2001] OJ No 6279 at para 56, 2001 CanLII 28411 (ON SC) [*Partak*]; *R v Keegstra*, [1990] 3 SCR 697 at paras 65–73, 1990 CanLII 24 (SCC) [*Keegstra*].
- <sup>24</sup> *R v Ferguson-Cadore and O’Grady*, 2016 ONSC 4872 (CanLII), 132 WCB (2d) 219 [*Ferguson-Cadore and O’Grady*].
- <sup>25</sup> See *Human Rights Code*, RSO 1990, c H-19, s 8 (Reprisals) [*Code*]; see also s 7(3)(b), which prohibits reprisal for rejecting “a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.”
- <sup>26</sup> Ottawa Police Service, “Peel’s Principles of Law Enforcement” (2019), online: *Ottawa Police Service* [www.ottawapolice.ca/en/about-us/Peel-s-Principles-.aspx](http://www.ottawapolice.ca/en/about-us/Peel-s-Principles-.aspx).
- <sup>27</sup> Lorne Brown & Caroline Brown, *An Unauthorized History of the RCMP* (Toronto: James Lorimer, 1978); Peter Edwards, *One Dead Indian: The Premier, the Police, and the Ipperwash Crisis* (Toronto: McClelland & Stewart, 2003); Christopher J Williams, “To Unnerve and Detect: Policing Black Activists in Toronto” in Livy Visano ed, *Law and Criminal Justice: A Critical Inquiry* (Toronto: APF Press, 2005).
- <sup>28</sup> These less powerful groups have been characterized as “police property,” a term coined by criminologist Robert Reiner which applies to “low-status, powerless groups whom the dominant majority see as problematic or distasteful. The majority are prepared to let the police deal with their ‘property’ and turn a blind eye to the manner in which this is done”, Robert Reiner, *The Politics of the Police*, 2nd ed. (Toronto: University of Toronto Press, 1992) at 118.
- <sup>29</sup> Section 4(2) of the *Police Services Act* lists “Public order maintenance” under the category of “Core police services;” see *Police Services Act*, RSO 1990, c P-15, s 4(2) [*Police Services Act*].
- <sup>30</sup> *Police Services Act*, *ibid* at ss 1(2), 1(5); *Comprehensive Ontario Police Services Act, 2019*, SO 2019, c1 [*COPS*], Schedule 1, *Community Safety and Policing Act, 2019*.
- <sup>31</sup> *Shaw v Phipps*, 2010 ONSC 3884 (CanLII) at para 91, 325 DLR (4th) 701 [*Shaw Sup Ct*]; *Shaw v Phipps*, 2012 ONCA 155 (CanLII) at para 42, 347 DLR (4th) 616 [*Shaw CA*]; the importance of human rights is also reflected in the prescribed Code of Conduct of the *Police Services Act*, which prohibits discrimination or harassment on *Code* grounds; see *Police Services Act*, *supra* note 29, s 80; O Reg 268/10, ss 2(1)(a)(i), 2(1)(a)(ii).
- <sup>32</sup> Government of Ontario, “Conservation officer powers and authorities” (29 March 2019) online: *Government of Ontario* [www.ontario.ca/page/conservation-officer-powers-and-authorities](http://www.ontario.ca/page/conservation-officer-powers-and-authorities).
- <sup>33</sup> Ontario Ministry of the Solicitor General, “Private Security and Investigative Services – Basic Testing – Security Guard Test Preparation Guide” (7 September 2016) online: *Ontario Ministry of*

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the Solicitor General [www.mcscs.jus.gov.on.ca/english/PSIS/BasicTesting/SecurityGuardStudyGuide/LegalAuthorities/SG\\_legal\\_authorities.html](http://www.mcscs.jus.gov.on.ca/english/PSIS/BasicTesting/SecurityGuardStudyGuide/LegalAuthorities/SG_legal_authorities.html).

<sup>34</sup> *Police Services Act*, *supra* note 29, s 41(1).

<sup>35</sup> *Police Services Act*, *ibid*, s 31.

<sup>36</sup> *Shaw* Sup Ct, *supra* note 31; *Shaw CA*, *supra* note 31.

<sup>37</sup> Ontario Human Rights Commission, "Ontario Human Rights Commission Submission to the Standing Committee on Justice Policy Bill 68, Comprehensive Ontario Police Services Act" (8 March 2019), online: *Ontario Human Rights Commission* [www.ohrc.on.ca/en/news\\_centre/ontario-human-rights-commission-submission-standing-committee-justice-policy-bill-68-comprehensive](http://www.ohrc.on.ca/en/news_centre/ontario-human-rights-commission-submission-standing-committee-justice-policy-bill-68-comprehensive).

<sup>38</sup> Murray Sinclair, "Thunder Bay Police Services Board Investigation – Final Report" (1 November 2018), online (pdf): *Tribunals Ontario: Safety, Licensing Appeals and Standards Division* [www.slasto-tsapno.gov.on.ca/ocpc-ccop/wp-content/uploads/sites/5/2018/12/TBPSB\\_Investigation\\_Final\\_Report\\_-\\_EN-FINAL-1.pdf](http://www.slasto-tsapno.gov.on.ca/ocpc-ccop/wp-content/uploads/sites/5/2018/12/TBPSB_Investigation_Final_Report_-_EN-FINAL-1.pdf) [Sinclair].

<sup>39</sup> Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) (Co-Chairs: M Gittens and D Cole) at 358 [Commission on Systemic Racism in the Ontario Criminal Justice System]; *R v Brown*, 2003 CanLII 52142 (ON CA) at para 9, 64 OR (3d) 161 [*Brown*]; *Elmardy v Toronto Police Services Board*, 2017 ONSC 2074 (CanLII) at para 34, 136 OR (3d) 483 [*Elmardy*]; *Peart*, *supra* note 1 at para 94; *Nassiah*, *supra* note 3 at para 113; *McKay v Toronto Police Services Board*, 2011 HRTO 499 (CanLII) at para 124 [*McKay*]; Ontario, The Honourable Roy McMurtry & Dr Alvin Curling, *The Review of the Roots of Youth Violence: Findings, Analysis and Conclusions*, vol. 1 (Toronto: Queen's Printer for Ontario, 2008) at 39–43; Ontario, The Honourable Roy McMurtry & Dr. Alvin Curling, *The Review of the Roots of Youth Violence: Executive Summary*, vol. 2 (Toronto: Queen's Printer for Ontario, 2008) at 8; Uzo Anucha et al, "Doing Right Together for Black Youth: What We Learned from the Community Engagement Sessions for the Ontario Black Youth Action Plan" (2017) at 6–7, online (pdf): *Youth Research and Evaluation eXchange (YouthREX)* [www.exchange.youthrex.com/report/doing-right-together-%EF%BF%BC%EF%BF%BC-black-youth-what-we-learned-community-engagement-sessions-ontario](http://www.exchange.youthrex.com/report/doing-right-together-%EF%BF%BC%EF%BF%BC-black-youth-what-we-learned-community-engagement-sessions-ontario); Ontario, *Report of the Independent Street Checks Review*, by The Honourable Michael H Tulloch, (Toronto: Queen's Printer for Ontario, 2018) at 37, 43–44, 100, 265–67 [Tulloch]; *Report of the Working Group of Experts on People of African Descent on its Mission to Canada: Note/By the Secretariat*, UNHRCOR, 36th Sess, UN Doc A/HRC/36/60/Add 1 (2017) at paras 35, 78; *Report of the Office of the United Nations High Commissioner for Human Rights – Compilation on Canada*, UNHRCOR, Working Group on the Universal Periodic Review, 30th Sess., UN Doc A/HRC/WG.6/30/CAN/2 (2018) at para 8; Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada*, UNCERDOR, 93rd Sess., UN Doc CERD/C/CAN/CO/21-23 (2018) at paras 15–16; Amnesty International, "Building Hope, Addressing Injustice: Amnesty International's 2019 Human Rights Report Card and Agenda for Canada" (2019) at 45–47, online (pdf): Amnesty International [www.amnesty.ca/sites/amnesty/files/Amnesty\\_HRA\\_2018-19\\_final\\_ENG.pdf](http://www.amnesty.ca/sites/amnesty/files/Amnesty_HRA_2018-19_final_ENG.pdf).

<sup>40</sup> *Le*, *supra* note 3.

<sup>41</sup> Scot Wortley & Akwasi Owusu-Bempah, "The Usual Suspects: Racial Profiling and Perceptions of Injustice in Canada" (2011a) 21:4 *Policing & Society* 395 [Wortley & Owusu-Bempah, "The Usual Suspects"]; Robin Fitzgerald & Peter Carrington, "Disproportionate Minority Contact in Canada: Police and Visible Minority Youth" (2011) 53:4 *Can J of Criminology and Criminal Justice* 449 at 471–74 [Fitzgerald & Carrington]; Scot Wortley & Julian Tanner, "Inflammatory Rhetoric? Baseless

Accusations? A Response to Gabor's Critique of Racial Profiling Research in Canada" (2005) 47:3 Can J of Criminology and Criminal Justice 581 at 584, 586–89 [Wortley & Tanner]; Steve Hayle, Scot Wortley & Julian Tanner, "Race, Street Life, and Policing: Implications for Racial Profiling" (2016) 58:3 Can J of Criminology and Criminal Justice 322 at 337–38, 340 [Hayle, Wortley & Tanner].

<sup>42</sup> Commission on Systemic Racism in the Ontario Criminal Justice System, *supra* note 39; Scot Wortley & Lysandra Marshall, *The Kingston Police Stop Pilot Project: Final Results* (Kingston, ON: Kingston Police Services Board, 2005) [Wortley & Marshall]; Lorne Foster, Les Jacobs & Bobby Siu, "Race Data and Traffic Stops in Ottawa, 2013 – 2015: A Report on Ottawa and the Police Districts" (October 2016), online (pdf): *Ottawa Police Service* [www.ottawapolice.ca/en/about-us/resources/.TSRDCP\\_York\\_Research\\_Report.pdf](http://www.ottawapolice.ca/en/about-us/resources/.TSRDCP_York_Research_Report.pdf) [Foster, Jacobs & Siu]; Léonel Bernard & Christopher McAll, "La mauvaise conseillère" [A Bad Advisor] (2010) 3:1, *Revue du CREMIS*, online: *CREMIS* [www.cremis.ca/jeunes-noirs-et-systeme-de-justice-la-mauvaise-conseillere](http://www.cremis.ca/jeunes-noirs-et-systeme-de-justice-la-mauvaise-conseillere) [Bernard & McAll]; for a list of newspaper articles identifying street check data results, see *Under Suspicion*, *supra* note 4 at 32.

<sup>43</sup> Of 51 Black police officers interviewed, 69% said they were the victim of racial profiling either on duty or off duty, and 75% said that officers in their police service practiced racial profiling. Akwasi Owusu-Bempah, "Insider Perspectives on Racial Profiling in Canada" (Presentation given to the American Society of Criminology, Atlanta, Georgia, 2013) [unpublished] [Owusu-Bempah, "Insider Perspectives"]; Philip Mascoll & Jim Rankin, "Racial Profiling Exists" *Toronto Star* (31 March 2005) A1, A20 [Mascoll & Rankin].

<sup>44</sup> For example, from 2008 to 2009, there were over 200,000 police stops and searches on the streets in England and Wales under the U.K.'s *Terrorism Act*. Black people were 6.5 times more likely and Asian people were five times more likely to be stopped than their representation in the population. Even still, these stops did not lead to any convictions for terrorism-related offences, see Tufyal Choudhury & Helen Fenwick, *The Impact of Counter-Terrorism Measures on Muslim Communities* (Manchester, UK: Equality and Human Rights Commission, 2011) at 31–32 [Choudhury & Fenwick]; in the U.S., searches of African Americans and Hispanic people are less or equally likely to reveal evidence of a crime than searches of White people, see Sharad Goel, Justin M. Rao & Ravi Shroff, "Precinct or Prejudice: Understanding Racial Disparities in New York City's Stop-and-Frisk Policy" (2016) 10:1 *The Annals of Applied Statistics* 365 [Goel, Rao & Shroff]; When the New York City police mapped the activities of thousands of Muslims to gather terrorism-related intelligence, it reportedly did not generate a single lead or result in a single terrorism investigation, see American Civil Liberties Union, "Raza v. City of New York – Legal Challenge to NYPD Muslim Surveillance Program" (3 August 2017), online: *ACLU* [www.aclu.org/cases/raza-v-city-new-york-legal-challenge-nypd-muslim-surveillance-program](http://www.aclu.org/cases/raza-v-city-new-york-legal-challenge-nypd-muslim-surveillance-program) [American Civil Liberties Union]; when the U.S. Customs Service re-evaluated their search procedures to eliminate racial, ethnic and gender bias, they were able to conduct 75% fewer searches without reducing the number of successful searches of passengers carrying contraband, see Lamberth Consulting, "Racial Profiling Doesn't Work" (2017) online: *Lamberth Consulting* [www.lamberthconsulting.com/racial-profiling-doesnt-work/](http://www.lamberthconsulting.com/racial-profiling-doesnt-work/) [Lamberth Consulting]; see also Jimmy Bourque et al, "The Effectiveness of Profiling from a National Security Perspective" (Ottawa: Canadian Human Rights Commission, 2009) at 81, online: *Canadian Human Rights Commission* [www.chrc-ccdp.gc.ca/eng/content/effectiveness-profiling-national-security-perspective](http://www.chrc-ccdp.gc.ca/eng/content/effectiveness-profiling-national-security-perspective) [Bourque et al]; see also Peart, *supra* note 1 ("Racial profiling will also ultimately undermine effective policing both by misdirecting valuable and limited resources and by alienating law-abiding members of the community who are members of the targeted race" at para 93).

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<sup>45</sup> See *R v Nguyen*, 2006 ONCJ 95 (CanLII) at para 22, 69 WCB (2d) 554 [*Nguyen Ct J*].

<sup>46</sup> Albert Alschuler, "Racial Profiling and the Constitution The Scope of Equal Protection" (2002) University of Chicago Legal Forum 163 at 226.

<sup>47</sup> Dennis P Rosenbaum et al, "Attitudes Toward the Police: The Effects of Direct and Vicarious Experience" (2005) 8:3 Police Quarterly 343.

<sup>48</sup> Statistics Canada, *Spotlight on Canadians: Results from the General Social Survey – Public confidence in Canadian institutions*, by Adam Cotter, Catalogue No 89-652-X2015007 (Ottawa: Statistics Canada, 7 December 2015) at 11, online: *Statistics Canada* [www150.statcan.gc.ca/n1/en/pub/89-652-x/89-652-x2015007-eng.pdf?st=nHKHGGJn](http://www150.statcan.gc.ca/n1/en/pub/89-652-x/89-652-x2015007-eng.pdf?st=nHKHGGJn) [*Public confidence in Canadian institutions*]; "*The Black Experience Project in the GTA: Overview Report* (Toronto: Environics Institute, 2017), online (pdf): *Environics Institute* [www.environicsinstitute.org/docs/default-source/project-documents/black-experience-project-gta/black-experience-project-gta---1-overview-report.pdf?sfvrsn=553ba3\\_2](http://www.environicsinstitute.org/docs/default-source/project-documents/black-experience-project-gta/black-experience-project-gta---1-overview-report.pdf?sfvrsn=553ba3_2) [*The Black Experience Project in the GTA*]; see also Environics Institute, *Urban Aboriginal Peoples Study: Main Report* (Toronto: Environics Institute, 2010) at 98, online (pdf): *Environics Institute* [www.environicsinstitute.org/docs/default-source/project-documents/urban-aboriginal-peoples-study/main-report.pdf?sfvrsn=b3677b5a\\_2](http://www.environicsinstitute.org/docs/default-source/project-documents/urban-aboriginal-peoples-study/main-report.pdf?sfvrsn=b3677b5a_2) [Environics Institute]; Liqun Cao, "Visible Minorities and Confidence in the Police" (2011) 53:1 CJCCJ 1 [Cao]; Scot Wortley & Akwasi Owusu-Bempah, "Unequal Before the Law: Immigrant and Racial Minority Perceptions of the Canadian Criminal Justice System" (2009) 10 Int. Migration & Integration 447 [Wortley & Owusu-Bempah, "Unequal Before the Law"]; Wortley & Owusu-Bempah, "The Usual Suspects," *supra* note 41.

<sup>49</sup> These are among the elements of the principle of procedural justice. See President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing* (Washington, DC: Office of Community Oriented Policing Services, 2015) at 9–10.

<sup>50</sup> *Le*, *supra* note 3 at para 95.

<sup>51</sup> Chris Gibson et al, "The Impact of Traffic Stops on Calling the Police for Help" (2010) 21:2 Criminal Justice Policy Review 139 [Gibson et al]; Lee Ann Slocum et al, "Neighbourhood Structural Characteristics, Individual-Level Attitudes, and Youths' Crime Reporting Intentions" (2010) 48:4 Criminology 1063 [Slocum et al]; Tom Tyler & Jeffrey Fagan, "Legitimacy and Cooperation: Why do People Help the Police Fight Crime in Their Communities" 6 Ohio State Journal of Criminal Law 231 [Tyler & Fagan]; Matthew Desmond, Andrew V Papachristos & David S Kirk, "Police Violence and Citizen Crime Reporting in the Black Community" (2016) 81:5 American Sociological Review 857 at 870–73 [Desmond, Papachristos & Kirk].

<sup>52</sup> Ontario Human Rights Commission, *Policy and guidelines on racism and racial discrimination* (Toronto: Queen's Printer for Ontario, 2005) at 18–30, online: *Ontario Human Rights Commission* [www.ohrc.on.ca/en/policy-and-guidelines-racism-and-racial-discrimination](http://www.ohrc.on.ca/en/policy-and-guidelines-racism-and-racial-discrimination) [*Policy on Racism*].

<sup>53</sup> It is sometimes difficult to draw a clear line between (1) acts that qualify as racial profiling and (2) those that do not, but nonetheless fall under the more general umbrella of racial discrimination. Furthermore, in actual practice, the Human Rights Tribunal of Ontario rarely determines whether an individual was a victim of racial profiling. Instead, it focuses more broadly on whether racial discrimination occurred in a particular instance.

<sup>54</sup> *Paying the Price*, *supra* note 5 ("Any action undertaken for reasons of safety, security or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment" at 6).

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<sup>55</sup> As the American Civil Liberties Association declares, “Any definition of racial profiling must include, in addition to racially or ethnically discriminatory acts, discriminatory omissions on the part of law enforcement as well.” See American Civil Liberties Association, “Racial Profiling: Definition” (2019), online: [ACLU www.aclu.org/other/racial-profiling-definition](http://www.aclu.org/other/racial-profiling-definition).

<sup>56</sup> *Under Suspicion*, *supra* note 4 at 30–78.

<sup>57</sup> Treatment not exclusively related to scrutiny would include certain aspects of under-policing such as a lack of preventative action in response to the probable victimization of Indigenous or racialized individuals.

<sup>58</sup> *R v Nguyen*, [2006] OJ No 272 (SCJ), 2006 CanLII 1769 [*Nguyen Sup Ct*].

<sup>59</sup> *Phipps v Toronto Police Services Board*, 2009 HRTO 877 (CanLII) at para 21 [*Phipps*]; *aff’d Shaw CA*, *supra* note 31.

<sup>60</sup> *Nassiah*, *supra* note 3; *McKay*, *supra* note 39.

<sup>61</sup> *McKay*, *ibid*.

<sup>62</sup> Ontario Human Rights Commission, “Under suspicion: Issues raised by Indigenous peoples” (2017), online: [Ontario Human Rights Commission www.ohrc.on.ca/en/under-suspicion-issues-raised-indigenous-peoples](http://www.ohrc.on.ca/en/under-suspicion-issues-raised-indigenous-peoples) (“In many communities, Indigenous people suffer egregious treatment by law enforcement that [includes] ...‘overcharging’ individuals[,]” according to the OFIFC).

<sup>63</sup> *Elmardy*, *supra* note 39.

<sup>64</sup> *Dudhi*, *supra* note 19 at paras 84–85.

<sup>65</sup> Service de police de la Ville de Montréal (SPVM), “Profiling” (2019), online: [SPVM www.spvm.qc.ca/en/Fiches/Details/Profiling](http://www.spvm.qc.ca/en/Fiches/Details/Profiling).

<sup>66</sup> Prashan Ranasinhe. “Reconceptualizing Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953-1972” (2010) 48:1 *Osgoode Hall Law Journal* 55 at 62.

<sup>67</sup> Julian Fantino, *Duty: The Life of a Cop* (Toronto: Key Porter Books, 2007) at 38.

<sup>68</sup> Bill O’Grady et al, “Tickets...and More Tickets: A Case Study of the Enforcement of the Ontario Safe Streets Act” (2013) 39:4 *Canadian Public Policy* 551 at 551 [*O’Grady*].

<sup>69</sup> *Ibid* at 553.

<sup>70</sup> *Ibid* at 542.

<sup>71</sup> Bill O’Grady et al, “Can I See Your ID? The Policing of Youth Homelessness in Toronto - Executive Summary” (Toronto: Justice for Children and Youth, and Homeless Hub Press, 2011) at 7, online (pdf): [Homeless Hub https://homelesshub.ca/sites/default/files/CanISeeYourID\\_execsummary.pdf](https://homelesshub.ca/sites/default/files/CanISeeYourID_execsummary.pdf) [*O’Grady et al*]; *ibid* at 543.

<sup>72</sup> 23.7% of Indigenous people and 21.3% of racialized people are low-income compared to less than 12% of Whites. See Statistics Canada, *Visible Minority (15), Individual Low-income Status (6), Low-income Indicators (4), Generation Status (4), Age (6) and Sex (3) for the Population in Private Households of Canada, Provinces and Territories, Census Metropolitan Areas and Census Agglomerations, 2016 Census – 25% Sample Data*, Table 98-400-X2016211 (Ottawa: Statistics Canada, 25 October 2017), online: [Statistics Canada https://www150.statcan.gc.ca/n1/en/catalogue/98-400-X2016211](https://www150.statcan.gc.ca/n1/en/catalogue/98-400-X2016211); Statistics Canada, *Aboriginal Identity (9), Individual Low-income Status (6), Low-income Indicators (4), Registered or Treaty Indian Status (3), Age (6) and Sex (3) for the Population in Private Households of Canada, Provinces and Territories, Census Metropolitan Areas and Census Agglomerations, 2016 Census – 25% Sample Data*, Table 98-400-X2016173 (Ottawa: Statistics Canada, 25 October 2017), online: [Statistics Canada https://www150.statcan.gc.ca/n1/en/catalogue/98-400-X2016173](https://www150.statcan.gc.ca/n1/en/catalogue/98-400-X2016173).

<sup>73</sup> *Supra* note 55.

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<sup>74</sup> Robyn Doolittle, "Unfounded: Why police dismiss 1 in 5 sexual assault claims as baseless," *The Globe and Mail* (3 February 2017), online: [www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/](http://www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/) [Doolittle]; *Doe v Metropolitan Toronto (Municipality) Commissioners of Police*, 1998 CanLII 14826 (ON SC), 39 OR (3d) 487 [Doe].

<sup>75</sup> Emily Rauhala, "Serial killer who stalked and terrorized Toronto's gay village sentenced to life," *The Washington Post* (8 February 2018), online: [www.washingtonpost.com/world/the\\_americas/serial-killer-who-stalked-torontos-gay-village-to-be-sentenced-friday/2019/02/07/311755b8-2a1c-11e9-97b3-ae59fbae7960\\_story.html?noredirect=on&utm\\_term=.b7c421c2799f](http://www.washingtonpost.com/world/the_americas/serial-killer-who-stalked-torontos-gay-village-to-be-sentenced-friday/2019/02/07/311755b8-2a1c-11e9-97b3-ae59fbae7960_story.html?noredirect=on&utm_term=.b7c421c2799f) [Rauhala].

<sup>76</sup> *R v Riley*, 2009 CanLII 15451 (ON SC) at para 5, 246 CCC (3d) 552 [Riley].

<sup>77</sup> *Ibid* at paras 120–23.

<sup>78</sup> *Patrong v Banks et al*, 2015 ONSC 3078 (CanLII) at para 68 [Patrong].

<sup>79</sup> Under-policing is also inconsistent with four of the *Principles* of the *Police Services Act* and *Community Safety and Policing Act, 2019*: "[t]he need to ensure the safety and security of all persons and property in Ontario;" "[t]he importance of respect for victims of crime and understanding of their needs;" "[t]he need for sensitivity to the pluralistic, multiracial and multicultural character of Ontario society;" and "[t]he importance of safeguarding the fundamental rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*." See *Police Services Act, supra* note 29, s 1; *COPS, supra* note 30, Schedule 1, *Community Safety and Policing Act, 2019*, s 1.

<sup>80</sup> Alexandra Natapoff, "Underenforcement" (2006) 75:3 *Fordham Law Review* 1722 [Natapoff].

<sup>81</sup> This notion of preferential under-policing is in accord with the following proposition put forth by the OHRC: "In discussing racism, it is necessary to consider the unearned privileges, i.e. benefits, advantages, access and/or opportunities that exist for members of the dominant group in society or in a given context." See *Policy on Racism, supra* note 52 at 13.

<sup>82</sup> Hayley A Hamilton et al, "Ethnoracial Differences in Cannabis Use Among Native-born and Foreign-born High School Students in Ontario" (2018) 17:2 *Journal of Ethnicity in Substance Abuse* [Hamilton et al].

<sup>83</sup> David A Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (New York: New Press, 2002) at 79–84 [Harris].

<sup>84</sup> US Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report, "QuickStats: Age-Adjusted Death Rates for Drug Overdose, by Race/Ethnicity – National Vital Statistics System, United States, 2015–2016" (30 March 2018) online: *US Centers for Disease Control and Prevention* [www.cdc.gov/mmwr/volumes/67/wr/pdfs/mm6712a9-H.pdf](http://www.cdc.gov/mmwr/volumes/67/wr/pdfs/mm6712a9-H.pdf) [QuickStats].

<sup>85</sup> Royal Canadian Mounted Police, *Missing and Murdered Aboriginal Women: A National Operational Overview* (Ottawa: RCMP, 2014), online (pdf): RCMP [www.rcmp-grc.gc.ca/wam/media/460/original/0cbd8968a049aa0b44d343e76b4a9478.pdf](http://www.rcmp-grc.gc.ca/wam/media/460/original/0cbd8968a049aa0b44d343e76b4a9478.pdf) [RCMP]; National Inquiry into Missing and Murdered Indigenous Women and Girls, *Interim Report – Our Women and Girls are Sacred* (Ottawa: Her Majesty the Queen in Right of Canada, 2017), online (pdf): *The National Inquiry into Missing and Murdered Indigenous Women and Girls* [www.mmiwg-ffada.ca/wp-content/uploads/2018/03/ni-mmiwg-interim-report.pdf](http://www.mmiwg-ffada.ca/wp-content/uploads/2018/03/ni-mmiwg-interim-report.pdf) [Women and Girls].

<sup>86</sup> *Women and Girls, ibid* at 7.

<sup>87</sup> Ministry of the Attorney General, *National Inquiry into Missing and Murdered Indigenous Women and Girls – Final Written Submissions of the Government of Ontario* (Toronto: Ministry of the Attorney General, n.d.) at 1, online (pdf): *Ministry of the Attorney General* [www.mmiwg-ffada.ca/wp-](http://www.mmiwg-ffada.ca/wp-)

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[content/uploads/2019/03/Govt-Ontario-Final-Written-Submission.pdf](#) [Final Written Submissions of the Government of Ontario].

<sup>88</sup> National Inquiry into Missing and Murdered Indigenous Women and Girls, *Truth-Gathering Process Part II Institutional Hearings - Police Policies and Practices* (Ottawa: International Reporting Inc, 2018) at 4, online (pdf): *National Inquiry into Missing and Murdered Indigenous Women and Girls* [www.mmiwg-ffada.ca/wp-content/uploads/2018/09/20180629\\_MMIWG\\_Regina\\_Policing\\_Part\\_II\\_Volume\\_X.pdf](http://www.mmiwg-ffada.ca/wp-content/uploads/2018/09/20180629_MMIWG_Regina_Policing_Part_II_Volume_X.pdf) [Truth-Gathering].

<sup>89</sup> *Ibid* (As Chief Superintendent Mark Pritchard stated, “You know, we heard from families that said they haven’t heard from the police over very long periods of time, and they called to, you know, try and speak to an officer and nobody called them back, and that’s just unacceptable” at 9).

<sup>90</sup> *Ibid* at 64.

<sup>91</sup> National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls – Volume 1a* (Ottawa: National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019) at 314, 612, 630 and 656, online (pdf): *National Inquiry into Missing and Murdered Indigenous Women and Girls* [www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final\\_Report\\_Vol\\_1a-1.pdf](http://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf) [Reclaiming Power Vol 1a].

<sup>92</sup> *Ibid* at 696.

<sup>93</sup> Office of the Independent Police Review Director, *Broken Trust: Indigenous People and the Thunder Bay Police Service* (Toronto: Office of the Independent Police Review Director, 2018), online (pdf): *OIPRD* [www.oiprd.on.ca/wp-content/uploads/OIPRD-BrokenTrust-Final-Accessible-E.pdf](http://www.oiprd.on.ca/wp-content/uploads/OIPRD-BrokenTrust-Final-Accessible-E.pdf) (“Under-policing refers, among other things, to failures to address or adequately address reports that Indigenous people have been victimized ... Indigenous people may be seen by police as less worthy victims in comparison to others and so their calls for assistance may be downplayed or even ignored. Crimes against them may not be investigated as thoroughly or prosecuted as vigorously” at 23) [OIPRD, “Broken Trust”]; *McKay v Toronto Police Services Board*, 2011 HRT0 499 (CanLII) at para 102 [McKay]; *Reclaiming Power Vol 1a, supra* note 91 at 526, 564–66, 654–55, 674–75, 681–90; National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls – Volume 1b* (Ottawa: National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019) at 154–56, 247–58, online: *National Inquiry into Missing and Murdered Indigenous Women and Girls* [www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final\\_Report\\_Vol\\_1b.pdf](http://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1b.pdf) [Reclaiming Power Vol 1b]; Written submission by the Ontario Federation of Indigenous Friendship Centres to the OHRC (January 2019) [OFIFC Written Submission].

<sup>94</sup> Jonathan Rudin, *Aboriginal Peoples and the Criminal Justice System* (Toronto: Ipperwash Inquiry, 2005) at 1, 4–7 online (pdf): *Ipperwash Inquiry* [www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy\\_part/research/pdf/Rudin.pdf](http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf) [Rudin].

<sup>95</sup> Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba - Volume 1, Chapter 16* (Winnipeg: Government of Manitoba, 1999), online: *Government of Manitoba* [www.ajic.mb.ca/volume1/chapter16.html](http://www.ajic.mb.ca/volume1/chapter16.html) [Aboriginal Justice Implementation Commission].

<sup>96</sup> Nicholas A Jones et al, “First Nations Policing: A Review of the Literature” (Regina, SK: Collaborative Centre for Justice and Society, 2014) at 6, online (pdf): Collaborative Centre for Justice and Safety [www.justiceandsafety.ca/rsu\\_docs/aboriginal-policing---complete-with-cover.pdf](http://www.justiceandsafety.ca/rsu_docs/aboriginal-policing---complete-with-cover.pdf) [Jones et al].

<sup>97</sup> Government of Ontario, *Data Standards for the Identification and Monitoring of Systemic Racism – Context* (Toronto: Government of Ontario, n.d.), online: *Government of Ontario*

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[www.ontario.ca/document/data-standards-identification-and-monitoring-systemic-racism/context](http://www.ontario.ca/document/data-standards-identification-and-monitoring-systemic-racism/context) [Data Standards].

<sup>98</sup> OIPRD, “Broken Trust”, *supra* note 93 at 61.

<sup>99</sup> *Ibid* at 64.

<sup>100</sup> *Reclaiming Power Vol 1a*, *supra* note 91 at 648.

<sup>101</sup> OFIFC Written Submission, *supra* note 93.

<sup>102</sup> OIPRD, “Broken Trust,” *supra* note 93 at 122; see also Antonia Zerbisias, “The police say suicide. The family says murder,” *Toronto Star* (19 January 2015) online:

[www.thestar.com/news/gta/2014/01/19/the\\_police\\_say\\_suicide\\_the\\_family\\_says\\_murder.html](http://www.thestar.com/news/gta/2014/01/19/the_police_say_suicide_the_family_says_murder.html) [Zerbisias].

<sup>103</sup> OIPRD, “Broken Trust,” *ibid* at 133.

<sup>104</sup> *Ibid* at 38; *Reclaiming Power Vol 1a*, *supra* note 91 at 630.

<sup>105</sup> OIPRD, “Broken Trust,” *supra* note 93 at 128–38.

<sup>106</sup> Ontario Federation of Indigenous Friendship Centres, Under-Policing Focus Group Report - Submission for the Ontario Human Rights Commission Racial Profiling Policy (Toronto: Ontario Federation of Indigenous Friendship Centres, 2019).

<sup>107</sup> *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360 at para 33 [Moore]; *Stewart v Elk Valley Coal Corp*, 2017 SCC 30, [2017] 1 SCR 591 at para 69 [Elk Valley]; *Shaw Sup Ct*, *supra* note 31 at paras 11–15, 76, *aff’d Shaw CA*, *supra* note 31; *Peel Law Association v Pieters*, 2013 ONCA 396 at paras 53–62 and 111–25, 116 OR (3d) 81 [Pieters]; *Québec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at paras 40–54, [2015] 2 SCR 789 [Bombardier]. Also note that the Code protects against discrimination based on perceived race or because of a person’s association, relationship or dealings with a racialized person.

<sup>108</sup> See also *Pieters*, *ibid* at paras 111–15; *R v Parks* [1993] OJ No 2157 (QL) at para 54, 1993 CanLII 3383 (ON CA) [Parks]; *Peart*, *supra* note 1 at para 93; *R v RDS*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484 at para 46 [RDS]; *R v Spence*, 2005 SCC 71 at paras 31–33, [2005] 3 SCR 458 [Spence].

<sup>109</sup> *Brown*, *supra* note 39 at para 44.

<sup>110</sup> *Pieters*, *supra* note 107 at para 111; *Peart*, *supra* note 1 at para 91; *Dudhi*, *supra* note 19 at paras 84–85.

<sup>111</sup> *Bombardier*, *supra* note 107 at paras 40–41, 49; *Shaw Sup Ct*, *supra* note 31 at para 76; *aff’d Shaw CA*, *supra* note 31; *Pieters*, *supra* note 107 at para 60; *Maynard v Toronto Police Services Board*, 2012 HRTO 1220 at para 150 [Maynard].

<sup>112</sup> But see *R v Simpson*, 2017 ONSC 491 (CanLII) at paras 24–27 [Simpson Sup Ct], where the court found that it was not racial profiling when the accused, a Black woman, was subjected to secondary inspection in part because she was travelling from Jamaica, which the customs official considered a “drug source country.”

<sup>113</sup> Alyson A Grine & Emily Coward, *Raising Issues of Race in North Carolina Criminal Cases* (Chapel Hill, NC: UNC School of Government, 2014) at 2-33 – 2-34, online: [UNC School of Government, www.defendermanuals.sog.unc.edu/race/2-police-investigation-stops-searches-and-arrests](http://UNC School of Government, www.defendermanuals.sog.unc.edu/race/2-police-investigation-stops-searches-and-arrests) [Grine & Coward]; *Brown*, *supra* note 39 (citing the Commission on Systemic Racism in the Ontario Criminal Justice System, affirmed that intersecting factors in addition to race may attract police attention: “sex (male), youth, make and condition of car (if any), location, dress, and perceived lifestyle” at para 9); see also *R v Thompson*, [2016] OJ No 2118, at para 14, 28 CR (7th) 394 (Ont CJ), [Thompson].

<sup>114</sup> *Quebec (Attorney General) v A*, 2013 SCC 5 (CanLII) at paras 204–06, [2013] 1 SCR 61 [Quebec v A].

<sup>115</sup> *R v Beepath*, [2011] OJ No 3189 at para 67, 2011 ONSC 4104 (CanLII) [*Beepath*]; *R v Kokesch*, [1990] 3 SCR 3 at para 46, 1990 CanLII 55 (SCC) [*Kokesch*]; *R v Greffe* [1990] 1 SCR 755 at para 43, 1990 CanLII 143 (SCC) [*Greffe*]; *Heath v Toronto Police Services Board*, 2012 HRTO 2364 at para 18 [*Heath*].

<sup>116</sup> *Shaw CA*, *supra* note 31 at para 14; *Pieters*, *supra* note 107 at paras 53–61; *Bombardier*, *supra* note 107 at para 49; *Moore*, *supra* note 107 at para 33.

<sup>117</sup> See, for e.g. *R c Gelin*, 2017 QCCM 41 (CanLII) at para 58 [*Gelin*]; *Thompson*, *supra* note 113 at para 14; *Brown*, *supra* note 39 at para 9; *Maynard*, *supra* note 111; see also Commission on Systemic Racism in the Ontario Criminal Justice System, *supra* note 39 at 358.

<sup>118</sup> *R v Smith*, 2015 ONSC 3548 (CanLII) at para 183, 338 CRR (2d) 1 [*Smith*].

<sup>119</sup> Andrea S Anderson, “Seeing Gender Differently in Racial Profiling” (2017) 14:1 Canadian Diversity 22 [Anderson]. Some Indigenous and racialized women have reported gender-based and sexual violence by police during alleged racial profiling encounters. Maynard argues that Black women may experience violence from police, including sexualized violence, if they are perceived as “uppity” and fail to be “subordinate and docile.” See Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Halifax: Fernwood Publishing, 2017) at 116, 118 [Maynard]. See also *Abbott v Toronto Police Services Board* 2009 HRTO 1909 at para 45 [Abbott].

<sup>120</sup> Ontario Human Rights Commission, *Strategy for a Safer Ontario – OHRC submission to MCSCS* (Toronto: OHRC, 2016), online: *Ontario Human Rights Commission* [www.ohrc.on.ca/en/strategy-safer-ontario-%E2%80%93-ohrc-submission-mcscs](http://www.ohrc.on.ca/en/strategy-safer-ontario-%E2%80%93-ohrc-submission-mcscs) [*Strategy for a Safer Ontario Submission*]; see also *A Collective Impact*, *supra* note 7.

<sup>121</sup> *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302 (CanLII) at paras 466–68. 52 CHRR 430 [*Radek*].

<sup>122</sup> *McKay*, *supra* note 39 at para 183.

<sup>123</sup> Akwasi Owusu-Bempah, *Black Males’ Perceptions of and Experience with the Police in Toronto* (Doctor of Philosophy, Centre for Criminology and Sociolegal Studies, University of Toronto, 2014) [unpublished] (“For one, youth are more likely to experience involuntary contact with the police due to their disproportionate involvement in crime and their frequent, often unsupervised and unstructured, use of public space (Hurst et al., 2000; Hinds, 2009)...This is particularly true for young Black men who are viewed in the eyes of the police as “symbolic assailants” or “born suspects” (Skolnick, 1966; Jones-Brown, 2007; Brunson and Miller, 2006)” at 113) [Owusu-Bempah, “Black Males’ Perceptions”]. See also, Commission des droits de la personne et des droits de la jeunesse Québec, *Racial Profiling and Systemic Discrimination of Racialized Youth: Report of the Consultation on Racial Profiling and its Consequences* (Bibliothèque et Archives nationales du Québec, 2011) at 11, online (pdf): *CDPDJ* [www.cdpedj.qc.ca/publications/Profiling\\_final\\_EN.pdf](http://www.cdpedj.qc.ca/publications/Profiling_final_EN.pdf) [CDPDJ].

<sup>124</sup> Royal Canadian Mounted Police, “Criminal Investigative Analysis” (nd), online: *RCMP* <http://www.rcmp-grc.gc.ca/to-ot/cpcmec-ccpede/bs-sc/crim-profil-eng.htm>.

<sup>125</sup> Karin D Martin & Jack Glaser, “Racial Profiling” in *Social and Cultural Debates: Responses to Illegal Immigration* (SAGE Publications, 2012) 491 at 497 [Martin & Glaser].

<sup>126</sup> *R v Chehil*, 2013 SCC 49 (CanLII) at para 40, [2013] 3 SCR 220 [*Chehil*].

<sup>127</sup> See *Nguyen* Sup Ct, *supra* note 58 at para 29.

<sup>128</sup> If race or related grounds are used as factors among other objective factors in a criminal profile, the law enforcement organization may be required to show that it is essential to include them, the profile does not give rise to stereotyping, and using them can be shown to be relevant to the proper conduct of a law enforcement; see also *Nguyen* Ct, *supra* note 45 at para 24; *R. v Mac*, [2005] O.J.

No. 527 (S.C.J.) at paras 4-5; *Neyazi, supra* note 17 at para 188); *R v Smith*, [2004] OJ No 4979 (SCJ) at paras 36–37.

<sup>129</sup> *Nguyen Sup Ct, supra* note 58 at para 21; *Nguyen Ct J, supra* note 45 at para 29; *Peart, supra* note 1 at para 91.

<sup>130</sup> *Maynard, supra* note 111.

<sup>131</sup> The Ottawa Police Service's *Racial Profiling Policy* states: "A police officer shall not, in the absence of a reasonable and racially neutral explanation, maintain that a racialized individual matches the description of a known suspect where: a) there are clearly distinguishing features between the two individuals; or b) the officer cannot articulate what other parts of the description he or she was relying on (e.g. height, weight, age, location, or other features)." See Ottawa Police Service, *Racial Profiling Policy*, No 5.39 (27 June 2011) at 3, online (pdf): OPS [www.ottawapolice.ca/en/news-and-community/resources/racial\\_profiling\\_policy27jun11\\_finalpdf.pdf](http://www.ottawapolice.ca/en/news-and-community/resources/racial_profiling_policy27jun11_finalpdf.pdf) [OPS Policy].

<sup>132</sup> *Maynard, supra* note 111.

<sup>133</sup> David Tanovich, "Applying the Racial Profiling Correspondence Test" (2017) 64 Criminal Law Quarterly 359 [Tanovich, "Applying the Racial Profiling Correspondence Test"]; *Neyazi, supra* note 17 at paras 180–88; see *Maynard, ibid.*

<sup>134</sup> O Reg 58/16, Part II (Prohibition – Certain Collections of Information).

<sup>135</sup> Adapted from Lori Fridell et al, *Racially Biased Policing: A Principled Response* (n.p.: Police Executive Research Forum, 2001) at 57.

<sup>136</sup> Chiefs of police and police services boards are jointly liable for the discriminatory actions of their officers, and have a joint responsibility for compliance with the *Code*. See *Phipps v Toronto Police Services Board*, 2009 HRTO 1604 at paras 3–40 [*Phipps*]; *Shaw Sup Ct, supra* note 31 at paras 98–121.

<sup>137</sup> *Re Dupont Canada Inc and Kingston Independent Nylon Workers Union*, [1993] OLAA No 426 at para 67; *Alberta v Alberta Union of Provincial Employees (Banack Grievance)*, [1999] AGAA No 74 at para 86; *Sinclair, supra* note 38 at 59–60.

<sup>138</sup> *Shaw Sup Ct, supra* note 31 at para 116.

<sup>139</sup> *Ibid* at para 119.

<sup>140</sup> *Smith v Menzies Chrysler Incorporated*, 2009 HRTO 1936 (CanLII) [*Menzies Chrysler*].

<sup>141</sup> *R v Huang*, 2010 BCPC 336 (CanLII) at paras 22–23.

<sup>142</sup> For example, in the OHRC's racial profiling consultation, participants reported that some police officers used excessive force, humiliating tactics, derogatory race-based language, engaged in reprisal or threats of reprisal, and singled out racialized people for repeated scrutiny, which was described as "harassment", see *Under Suspicion, supra* note 4, at 41–43, 95.

<sup>143</sup> *Pieters, supra* note 107 at paras 111–15; *Parks, supra* note 108 at para 54; *Peart, supra* note 1 at para 93; *RDS, supra* note 108 at para 46; *Spence, supra* note 108 at paras 31–33.

<sup>144</sup> "Psychology Of Bias: Promoting Fair and Impartial Public Safety: A Science Based Perspective" (2018), online: *Fair and Impartial Policing* <https://fipolicing.com/psychology-of-bias/>.

<sup>145</sup> Jennifer L. Eberhardt, *Strategies for Change: Research Initiatives and Recommendations to Improve Police-Community Relations in Oakland, Calif* (Stanford, CA: Stanford University, SPARQ, 2016), online: *Issuelab* [www.issuelab.org/resource/strategies-for-change-research-initiatives-and-recommendations-to-improve-police-community-relations-in-oakland-ca.html](http://www.issuelab.org/resource/strategies-for-change-research-initiatives-and-recommendations-to-improve-police-community-relations-in-oakland-ca.html) [Eberhardt].

<sup>146</sup> *Johnson v Halifax (Regional Municipality) Police Service*, [2003] NSHRBID No 2 at para 11 [*Johnson*].

<sup>147</sup> *Rezko, supra* note 9 at para 234.

<sup>148</sup> *Nassiah, supra* note 3 at para 166.

<sup>149</sup> *Longueuil (Ville de) c Debellefeuille*, 2012 QCCM 234 at para 121 [*Longueuil*].

<sup>150</sup> *Longueuil, ibid* at para 121.

<sup>151</sup> *Johnson, supra* note 146 at para 62; *Abbott, supra* note 119 at paras 37, 146; *Maynard, supra* note 111 at paras 180–85; *McCarthy v Kenny Tan Pharmacy*, 2015 HRT0 1303 (CanLII) at para 90 [*McCarthy*]; *Radek, supra* note 121 at para 471; *Pieters, supra* note 107 at para 128.

<sup>152</sup> *McCarthy, ibid*.

<sup>153</sup> *Neyazi, supra* note 17 (“Racial profiling can occur in circumstances where the state actor is not rude or hostile” at para 195).

<sup>154</sup> *Harris, supra* note 83 at 69–71.

<sup>155</sup> *Johnson, supra* note 146 at para 62.

<sup>156</sup> *Nassiah, supra* note 3 at para 166; *Rezko, supra* note 9 at para 183.

<sup>157</sup> *Elmardy, supra* note 39 at paras 107–09.

<sup>158</sup> *Nassiah, supra* note 3 at para 166, *Elmardy, ibid* at para 20.

<sup>159</sup> *Nassiah, ibid* at para 107.

<sup>160</sup> *Abbott, supra* note 119 at para 146.

<sup>161</sup> *McKay, supra* note 39 at paras 184, 201.

<sup>162</sup> National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: Executive Summary of the Final Report – National Inquiry into Missing and Murdered Indigenous Women and Girls* (Ottawa: National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019) online (pdf): *National Inquiry into Missing and Murdered Indigenous Women and Girls* [www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Executive\\_Summary.pdf](http://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Executive_Summary.pdf) [*Reclaiming Power - Executive Summary*].

<sup>163</sup> *Johnson, supra* note 146 at para 56; *McKay, supra* note 39 at paras 190–92; *Abbott, supra* note 119 at paras 43–44; *Radek, supra* note 121 at para 471; *Maynard, supra* note 111 at para 176.

<sup>164</sup> *Maynard, ibid*.

<sup>165</sup> *Tulloch, supra* note 39 at 27.

<sup>166</sup> In *Thompson, supra* note 113 at paras 32–33, the court found that once the police officer stopped the car, he moved immediately to search the car’s passengers, based on the hunch that there was some criminal activity. The judge agreed with the Applicant’s position that “The speed with which the ‘grounds’ [for arrest] were developed undermines their objective reasonableness.” See also *Abbott, supra* note 119 at para 39; *Maynard, supra* note 111 at para 45.

<sup>167</sup> *Abbott, ibid* at para 39.

<sup>168</sup> Guidance on what is required to establish “reasonable suspicion” is laid out in *R v Mann* [2004] 3 SCR 59 at para 34, 2004 SCC 52 (CanLII) [*Mann*]; *Chihil, supra* note 126 at paras 26, 29, 31–33; *R. v MacKenzie*, [2013] SCJ No. 50 at para 71, [2013] 3 SCR 250 (SCC) [*MacKenzie*].

<sup>169</sup> *Elmardy, supra* note 39 at para 20. In *Nassiah, supra* note 3 at para 165, the adjudicator recognized that “there is no legal right to be presumed innocent during an investigation” and accepted evidence that law enforcement officers may use an “assumption of guilt” approach as an investigative technique. However, the adjudicator found that the police officer assumed the woman was guilty during the entire investigation until he was shown conclusive evidence that she was innocent. This evidence, along with other factors, formed a pattern of behaviour that led to the finding that the woman (who was Black) was treated with more suspicion than a White suspect would have been. Even where an “assumption of guilt” approach is used as an interrogation tool, a law enforcement officer must still keep an open mind to assess all the evidence objectively, see paras 147, 153, 165–66.

<sup>170</sup> *Radek, supra* note 121 at paras 524–28, 173–74.

<sup>171</sup> *Nassiah, supra* note 3 at para 166.

<sup>172</sup> *McKay, supra* note 39 at paras 139–40; *Abbott, supra* note 119 at para 46, *Nassiah, ibid*; *Phipps v Toronto Police Services Board*, 2009 HRTO 877 at paras 24–28.

<sup>173</sup> *Nassiah, ibid*.

<sup>174</sup> To combat this issue, the American Civil Liberties Union suggests that department policies should be developed. When police dispatchers receive calls about people perceived to be suspicious, they should collect enough information from callers to identify whether there is possible criminal activity occurring that officers should investigate. If there is reason to believe the call is motivated by racial bias, the dispatcher should have the discretion not to send police, or should notify officers that racial bias may be a concern so officers can investigate this further. Carl Takei, “How Police Can Stop Being Weaponized by Bias-Motivated 911 Calls” (18 June 2018), online: *ACLU* [www.aclu.org/blog/racial-justice/race-and-criminal-justice/how-police-can-stop-being-weaponized-bias-motivated](http://www.aclu.org/blog/racial-justice/race-and-criminal-justice/how-police-can-stop-being-weaponized-bias-motivated) [Takei].

<sup>175</sup> *R c Campbell*, [2005] QJ No 394 at para 70 (CQ); *McKay, supra* note 39 at paras 110, 148; *R v Simpson*, [1993] OJ No 308 at para 61 (CA); *Elmardy, supra* note 39 at paras 18–19; *Thompson, supra* note 113 at paras 15–16.

<sup>176</sup> The fact that a person appears nervous when police approach is not something that, on its own, is enough to establish “reasonable suspicion” to detain that person, see *R v Kang-Brown*, [2008] 1 SCR 456 at para 96, [2008] SCJ No 18.

<sup>177</sup> Owusu-Bempah, “Black Males’ Perceptions,” *supra* note 123 (“a lack of willingness to engage on the part of a Black citizen may also be read negatively by a police officer whose judgment of the citizen’s demeanour may also be influenced by racial bias” at 184) [Owusu-Bempah]; *Radek, supra* note 121 at paras 132–33, 558–63.

<sup>178</sup> *Radek, ibid* at paras 562–63.

<sup>179</sup> *Radek, ibid* at paras 563–64.

<sup>180</sup> *Mann, supra* note 168 at para 47 (S.C.C.); *Ohenhen, supra* note 228 at para 63. It also cannot be a reason for police to stop someone, ask and record identifying information. See O. Reg. 58/16: Collection of Identifying Information In Certain Circumstances – Prohibition and Duties at 5(4)(3); *R v Blackburn*, (11 January 2017), Toronto (Ont CJ) (unreported) at para 87.

<sup>181</sup> “The citing of an area as ‘high-crime’ requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity.” *United States v Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000) at paras 30–32.

<sup>182</sup> See *Shaw Sup Ct, supra* note 31, *aff’d Shaw CA, supra* note 31.

<sup>183</sup> See Tanovich, *supra* note 158 at 9 for a range of cases in which ambiguous behaviours were incorrectly perceived by police as grounds to detain individuals.

<sup>184</sup> *Elmardy v Toronto Police Services Board*, 2015 ONSC 2952 (CanLII) at para 64.

<sup>185</sup> *Elmardy, supra* note 39 at para 19.

<sup>186</sup> Acting based on an outstanding immigration warrant may be a *bona fide* (legitimate) reason. See No One is Illegal-Toronto, “Often Asking, Always Telling: The Toronto Police Service and the Sanctuary City Policy” (2015) at 9, online: *No One is Illegal-Toronto* [www.toronto.nooneisillegal.org/ImmigrationsDirtyWork](http://www.toronto.nooneisillegal.org/ImmigrationsDirtyWork) [No One is Illegal].

<sup>187</sup> In *Hum v Royal Canadian Mounted Police*, 1986 CanLII 79 (CHRT), the Canadian Human Rights Tribunal (CHRT) ruled that it was discriminatory for police to ask the claimant, who was of Chinese Canadian background and born in Canada, where he was born and if he was a Canadian citizen. The CHRT determined that the same questioning would not have occurred if he was Caucasian and speaking in the same way.

<sup>188</sup> No One Is Illegal, *supra* note 186 at 24–26.

<sup>189</sup> Routinely conducting immigration status checks on victims or witnesses of crime or people under investigation would likely have a disparate impact on non-citizens who are undocumented or have precarious status. They would face an increased risk of detention and deportation after reporting crime or being investigated for offences unrelated to their immigration status. It is currently an open question whether the ground of citizenship in the *Code* would apply not only to distinctions between citizens and non-citizens, but also to distinctions between non-citizens with legal status in Canada and people without legal status. See *Toussaint v Ontario (Health and Long-Term Care)*, 2011 HRTO 760 (CanLII) at 7; *Haseeb v Imperial Oil Limited*, 2018 HRTO 957.

<sup>190</sup> The Ontario Superior Court in *Elmardy*, *supra* note 39 at para 22, stated: “As noted in *Brown*, at para 45, the inference that a police officer is lying about why she or he singled out an individual for attention is a circumstance that is ‘capable of supporting a finding that the stop was based on racial profiling.’” See also *Thompson*, *supra* note 113; *Neyazi*, *supra* note 17 at para 198.

<sup>191</sup> *R v Khan*, 2004 CanLII 66305 (ON SC) at para 68, 244 DLR (4th) 443 [*Khan*].

<sup>192</sup> *Dudhi*, *supra* note 19 at para 85.

<sup>193</sup> *Peart*, *supra* note 1 at para 91; see also *Dudhi*, *ibid*.

<sup>194</sup> Emma McIntosh & Alex McKeen, “Overrepresentation of Indigenous people in Canada’s prisons persists amid drop in overall incarceration,” *The Toronto Star* (19 June 2018), online: [www.thestar.com/news/canada/2018/06/19/overrepresentation-of-indigenous-people-in-canadas-prisons-persists-amid-drop-in-overall-incarceration.html](http://www.thestar.com/news/canada/2018/06/19/overrepresentation-of-indigenous-people-in-canadas-prisons-persists-amid-drop-in-overall-incarceration.html).

<sup>195</sup> *Nassiah*, *supra* note 3 at para 113; *Peart*, *supra* note 1 at para 94.

<sup>196</sup> *Le*, *supra* note 3 at paras 89–97.

<sup>197</sup> *Radek*, *supra* note 121, at paras 126, 556–57, 563, 604.

<sup>198</sup> See *Code*, *supra* note 25, s 11 (Constructive discrimination).

<sup>199</sup> The test for undue hardship is set out fully in the OHRC’s *Policy on ableism and discrimination based on disability* (Toronto: Ontario Human Rights Commission, 2016), online: [OHRC www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability](http://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability).

<sup>200</sup> The *bona fide* requirement test also applies to interrelated policies, practices and attitudes that are at issue in systemic discrimination cases, see *Radek*, *supra* note 121 at paras 610–31.

<sup>201</sup> *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at para 54, 1999 CanLII 652 (SCC) [*Meiorin*]; *British Columbia (Council for Human Rights)*, [1999] 3 SCR 868 at para 20 [*Grismer*].

<sup>202</sup> In the domain of corrections, for example, applying risk assessment tools to Indigenous people in custody has been recognized as a factor in perpetuating negative outcomes for Indigenous inmates; hence Correctional Services Canada (CSC) has a positive obligation to avoid generating such outcomes. As noted by Ralph Goodale, Minister of Public Safety and Emergency Preparedness, “A June 2018 decision of the Supreme Court of Canada, *Ewert v Canada*, confirmed that...CSC must ensure that its use of the tools with respect to Indigenous offenders do not perpetuate discrimination or contribute to a disparity in correctional outcomes between Indigenous and non-Indigenous offenders.” See Letter from Ralph Goodale to John McKay (15 October 2018), Ottawa, online (pdf): [www.ourcommons.ca/content/Committee/421/SECU/GovResponse/RP10083641/421\\_SECU\\_Rpt22\\_GR/421\\_SECU\\_Rpt22\\_GR-e.pdf](http://www.ourcommons.ca/content/Committee/421/SECU/GovResponse/RP10083641/421_SECU_Rpt22_GR/421_SECU_Rpt22_GR-e.pdf).

<sup>203</sup> *Sinclair*, *supra* note 38.

<sup>204</sup> *Odhavji Estate v. Woodhouse*, [2003] 3 SCR 263, 2003 SCC 69 (CanLII) [*Odhavji Estate*].

<sup>205</sup> *Sinclair*, *supra* note 38.

<sup>206</sup> *Ibid.*

<sup>207</sup> In cases of systemic racial profiling, there must be a link between the experiences of an individual or group and the system. See the OHRC's *Policy and guidelines on racism and racial discrimination*, *supra* note 52 for more information.

<sup>208</sup> Some law enforcement organizations and researchers have questioned the conclusions of race-based data collection studies on police stops based on concerns about flawed methodologies. Common concerns with police stop studies include the use of population statistics as benchmarks for comparison, the ambiguities of correctly recording a person's racial identity, and whether the study accounts for other explanations for the results. Collecting data on practices that happen after a stop (such as search practices) reduce these concerns.

<sup>209</sup> *Aiken v Ottawa Police Services Board*, 2019 HRTO 934 (CanLII), at paras 130, 132 [Aiken].

<sup>210</sup> *Policy on Racism*, *supra* note 52 at 46.

<sup>211</sup> In *Brown*, *supra* note 39 at para 81, the Ontario Court of Appeal noted: "[R]acial profiling can be a subconscious factor impacting on the exercise of a discretionary power in a multicultural society." Also, "[R]acialization in Canadian society is a recognized fact both inside and outside the criminal justice system. Wherever broad discretion exists, racialization can influence decisions and produce racial inequality in outcomes". See Commission on Systemic Racism in the Ontario Criminal Justice System, *supra* note 39 at iv, ix, 105, 359.

<sup>212</sup> A New Jersey study showed that 19.4% of tickets issued by radar unit were to Black people, while 43.8% of tickets issued by patrol unit were to Black people. See Joseph B Kadane & John Lamberth, "Are blacks egregious speeding violators at extraordinary rates in New Jersey?" *Law, Probability and Risk*, (2009) 8:2 139 at 141.

<sup>213</sup> *Ewert v Canada*, [2018] 2 SCR 165, 2018 SCC 30 (CanLII) at paras 54–59 [Ewert]; Commission on Systemic Racism in the Ontario Criminal Justice System, *supra* note 39 at 50; *Radek*, *supra* note 121 at paras 501, 545–631.

<sup>214</sup> *Under Suspicion*, *supra* note 4 at 76.

<sup>215</sup> See *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at 38 (in the context of gender) and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at 880 (in the context of disability). See *Moore*, *supra* note 107 at paras 59–62; *Ewert*, *supra* note 213 at paras 57–62.

<sup>216</sup> In Ontario, police officers are disproportionately White. Statistics Canada reports that in 2016 in Ontario, almost 30% of the population reported being a "visible minority," compared to just under 11% of police officers. See Statistics Canada, "Police Resources in Canada, 2017," *The Daily* (28 March 2018), online: *Statistics Canada* [www150.statcan.gc.ca/n1/daily-quotidien/180328/dq180328c-eng.htm](http://www150.statcan.gc.ca/n1/daily-quotidien/180328/dq180328c-eng.htm).

<sup>217</sup> Carol Tator & Frances Henry, *Racial Profiling in Canada: Challenging the Myth of "a Few Bad Apples"* (Toronto: University of Toronto Press, 2006) at 103 [Tator & Henry].

<sup>218</sup> Alok Mukherjee & Tim Harper, *Excessive Force: Toronto's Fight to Reform City Policing* (Toronto: Douglas & McIntyre, 2018) at 188.

<sup>219</sup> Tator & Henry, *supra* note 217 at 98–101.

<sup>220</sup> *Ibid* at 97.

<sup>221</sup> Aggressive policing practices refer to arresting or ticketing people for minor offences without discretion, or using an aggressive manner.

<sup>222</sup> *McKay*, *supra* note 39 at para 92; as the Supreme Court has stated, "...that a neighbourhood is policed more heavily imparts a *responsibility* on police officers to be vigilant in respecting the privacy,

dignity and equality of its residents who already feel the presence and scrutiny of the state more keenly than their more affluent counterparts in other areas of the city.” See *Le*, *supra* note 3 at para 60. The Court also notes that “[r]equiring the police to comply with the *Charter* in *all* neighbourhoods and to respect the rights of *all* people upholds the rule of law, promotes public confidence in the police, and provides safer communities.” See *Le*, *supra* note 3 at para 165.

<sup>223</sup> Legally, the claimant must establish a *prima facie* case of discrimination (i.e. that the person’s protected characteristic, like race, was a factor in the adverse treatment). Once a *prima facie* case of discrimination has been established, the burden shifts to the organization or person responsible to provide a credible non-discriminatory explanation for the action, or in systemic racial profiling cases, justify the policy, practice or requirement as reasonable and *bona fide* in the circumstances.

<sup>224</sup> In *Brown*, the Ontario Court of Appeal determined that “racial profiling can be a subconscious factor impacting on the exercise of a discretionary power in a multicultural society,” *supra* note 39 at para 81. Similarly, the Commission on Systemic Racism in the Ontario Criminal Justice System found that “wherever broad discretion exists, racialization can influence decisions and produce racial inequality in outcomes,” *supra* note 39 at iv, ix, and 359.

<sup>225</sup> Commission on Systemic Racism in the Ontario Criminal Justice System, *ibid*.

<sup>226</sup> See recommendations and *Strategy for a Safer Ontario Submission*, *supra* note 120.

<sup>227</sup> OPS policy, *supra* note 131; *McKay*, *supra* note 39 at para 93.

<sup>228</sup> OPS Policy, *ibid*.

<sup>229</sup> *Blackburn*, *supra* note 180 at para 14; see also *Brown v Durham (Regional Municipality) Police Force*, [1998] OJ No 5274 at paras 38–39 (CA); *R v Nolet*, 2010 SCC 24 at paras 38–39; *R v Humphrey*, 2011 ONSC 3024 at para 88.

<sup>230</sup> *R v Ohenhen*, 2016 ONSC 5782 (CanLII) [*Ohenhen*].

<sup>231</sup> *Khan*, *supra* note 191.

<sup>232</sup> *Longueuil*, *supra* note 149.

<sup>233</sup> *Ferguson-Cadore and O’Grady*, *supra* note 24.

<sup>234</sup> Donald Tomaskovic-Devey, Marcinda Mason & Matthew Zingraff, “Looking for the Driving While Black Phenomena: Conceptualizing Racial Bias Processes and their Associated Distributions” (2004) 7:1 *Police Quarterly* 3 [Tomaskovic-Devey et al].

<sup>235</sup> *McKay*, *supra* note 39 at para 94. Stops using this type of rationale may overlap with pretext stops.

<sup>236</sup> Donald Tomaskovic-Devey et al, *supra* note 234.

<sup>237</sup> Canadian research has shown that Black people are subjected to disproportionately more stops and arrests for drug-related reasons in neighbourhoods that are more socio-economically advantaged and where White people are more likely to live. See Yunliang Meng, “Racially Biased Policing and Neighbourhood Characteristics: A Case Study in Toronto, Canada” (2014) *Cybergeo: European Journal of Geography* online: *Cybergeo* 665.

<sup>238</sup> *Phipps*, *supra* note 136.

<sup>239</sup> *Ohenhen*, *supra* note 230; *Khan*, *supra* note 191; *Brown*, *supra* note 39; *Johnson*, *supra* note 146.

<sup>240</sup> Scot Wortley, “Police use of Force in Ontario: An Examination of Data from the Special Investigations Unit, Final Report” (2006) – research project conducted on behalf of the African Canadian Legal Clinic for submission to the Ipperwash Inquiry at 11, online (pdf): [www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy\\_part/projects/pdf/AfricanCanadianClinicIpperwashProject\\_SIUStudybyScotWortley.pdf](http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/projects/pdf/AfricanCanadianClinicIpperwashProject_SIUStudybyScotWortley.pdf) [Wortley].

<sup>241</sup> See for example, Kate Wells, “State Police Traffic Quotas Could Lead to Racial Profiling, ACLU Says” (24 August 2016), online: *Michigan Radio* [www.michiganradio.org/post/state-police-traffic-quotas-could-lead-racial-profiling-aclu-says](http://www.michiganradio.org/post/state-police-traffic-quotas-could-lead-racial-profiling-aclu-says).

<sup>242</sup> Malcolm Sparrow, *Handcuffed: What Holds Policing Back and the Keys to Reform* (Washington, DC: Brookings Institution Press, 2016) at 21–22, 68.

<sup>243</sup> The balance between national security considerations and human rights has been recognized by the Government of Canada, the courts and at the international level. Special Senate Committee on the Anti-Terrorism Act, *Fundamental Justice in Extraordinary Times: Main Report Of The Special Senate Committee On The Anti-Terrorism Act* (2007) (David P. Smith, Chair) 39th Parliament, 1st Session, 3rd report at 21, online: *Government of Canada* [www.publications.gc.ca/site/eng/395384/publication.html](http://www.publications.gc.ca/site/eng/395384/publication.html); United Nations Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin: Ten Areas of Best Practices in Countering Terrorism*, UNHRCOR, 16<sup>th</sup> Sess, UN Doc A/HRC/16/51 (2010) at 6; *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350, 2007 SCC 9 (CanLII) at 27; *Application under s.83.28 of the Criminal Code (Re)*, [2004] 2 SCR 248, 2004 SCC 42 (CanLII) at 7; *ICCPR*, *supra* note 21.

<sup>244</sup> In *Bombardier*, *supra* note 107 at para 99, the Supreme Court of Canada upheld the general principle that an organization cannot “blindly comply” with a discriminatory decision of a third party (in this case, a foreign authority) without “exposing itself to liability under the Charter.” Also, the *Code* applies to provincial/municipal actors performing duties under the federal power unless the doctrines of paramountcy or interjurisdictional immunity apply. The HRTO has found no basis for finding that applying the *Code* to prohibit discrimination based on race in policing services, including arrest and detention, impairs the core of the federal power over criminal law and criminal procedure. *Pierre Louis v Ottawa Police Services Board*, 2010 HRTO 863 (CanLII) (upheld at reconsideration).

<sup>245</sup> The definition of terrorism in the *Canadian Criminal Code* requires that acts or omissions be committed “in whole or in part for a political, religious or ideological purpose, objective or cause,” among other requirements, see *Criminal Code*, RSC 1985, c C-46, s 83.01(1)(b)(i)(A).

<sup>246</sup> *R v Khawaja*, 2012 SCC 69 at para 83 [*Khawaja* SCC].

<sup>247</sup> *R v Khawaja*, 2010 ONCA 862 at paras 133–34 [*Khawaja* CA], upheld in *Khawaja* SCC, *ibid* at para 83.

<sup>248</sup> *Neyazi*, *supra* note 17.

<sup>249</sup> Fareed Zakaria, “Freedom vs. Security,” *Newsweek* (7 July 2002); online: [www.newsweek.com/freedom-vs-security-147287](http://www.newsweek.com/freedom-vs-security-147287).

<sup>250</sup> *R v Nuttall*, 2016 BCSC 1404 at para 790.

<sup>251</sup> *R v Calderon*, [2004] OJ No 3474 (CA).

<sup>252</sup> Academic research has shown that lax law enforcement responses to right-wing extremists have been an enabling factor in the growth of such extremism in Canada. One article notes: “Typically, activity of the far right has not been monitored or taken seriously,” a tendency that stands in sharp contrast to the vigorous attention paid to members of Muslim communities. See Ryan Scrivens & Barbara Perry, “Resisting the Right: Countering Right-Wing Extremism in Canada” (2017) 59:4 *Revue canadienne de criminology et de justice pénale* 534 at 545.

<sup>253</sup> Public Safety Canada, *2018 Public Report on the Terrorist Threat to Canada: Building a Safe and Resilient Canada*, 3rd revision (Ottawa: Her Majesty the Queen in Right of Canada, April 2019), online (pdf): *Public Safety Canada* [www.publicsafety.gc.ca/cnt/rsrscs/pblctns/pblc-rprt-trrrsm-thrt-cnd-2018/pblc-rprt-trrrsm-thrt-cnd-2018-en.pdf](http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/pblc-rprt-trrrsm-thrt-cnd-2018/pblc-rprt-trrrsm-thrt-cnd-2018-en.pdf). The references to Sunni Islam and Sikhism have since

been removed from the report, see Stewart Bell and Abigail Bimman, “Government removes all mention of ‘Sunni’ and ‘Shia’ extremism from terrorism threat report,” *Global News* (2 May 2019), online: [www.globalnews.ca/news/5230488/government-removes-sunni-shia-from-terrorism-threat-report/](http://www.globalnews.ca/news/5230488/government-removes-sunni-shia-from-terrorism-threat-report/).

<sup>254</sup> National Council of Canadian Muslims, Press Release, “NCCM: Government’s Terrorism Report Unfairly Stigmatizes Canadian Minority Communities” (14 December 2018), online: [www.nccm.ca/nccm-governments-terrorism-report-unfairly-stigmatizes-canadian-%EF%BB%BFminority-communities/](http://www.nccm.ca/nccm-governments-terrorism-report-unfairly-stigmatizes-canadian-%EF%BB%BFminority-communities/). The World Sikh Organization has also critiqued the inclusion of Sikhs in the report, see Mia Rabson, “World Sikh Organization demands that Canada prove Sikh extremism is a threat,” *Toronto Star* (14 December 2018), online: [www.thestar.com/news/canada/2018/12/14/world-sikh-organization-demands-that-canada-prove-sikh-extremism-is-a-threat.html](http://www.thestar.com/news/canada/2018/12/14/world-sikh-organization-demands-that-canada-prove-sikh-extremism-is-a-threat.html).

<sup>255</sup> Risk assessment inventories are commonly used in the corrections context. Approaches such as community hubs or situation tables are other forms of risk prediction techniques used by law enforcement organizations. New technologies used to collect and/or analyze data include biometrics, predictive analytics, algorithms and artificial intelligence. Canadian Human Rights Commission, *Bill C-59, An Act Respecting National Security Matters: Submission to the House of Commons Standing Committee on Public Safety and National Security* (Ottawa: Canadian Human Rights Commission, 2018) at 3–4.

<sup>256</sup> Organizations cannot contract out of the provisions of the *Code* under the umbrella of a private agreement, see *Ontario Human Rights Commission v Etobicoke*, [1982] 1 SCR 202 at p 213 (relating to collective agreements), 1982 CanLII 15 (SCC) [*Etobicoke*]; in the Supreme Court of Canada case of *Newfoundland Association of Public Employees v The Queen in Right of Newfoundland (Green Bay Health Care Centre)* (1996), the Court noted: “Human rights legislation sets out a floor beneath which the parties cannot contract out. Parties can contract out of human rights legislation if the effect is to raise and further protect the human rights of the people affected.” See *Newfoundland Association of Public Employees v Newfoundland (Green Bay Health Care Centre)*, [1996] 2 SCR 3 at para 26, [1996] SCJ No 54; *Puleio v Moneris Solutions*, 2011 HRTO 659 (CanLII) (in relation to contracting to a disability management company).

<sup>257</sup> *Ewert*, *supra* note 213 at para 65.

<sup>258</sup> Sarah Brayne, “Big Data Surveillance: The Case of Policing” (2017) 82:5 *American Sociological Review* 986 at 977–87 [Brayne].

<sup>259</sup> Andrew Guthrie Ferguson, *The Rise of Big Data Policing: Surveillance, Race and the Future of Law Enforcement* (New York: New York University Press, 2017) at 44 [Ferguson].

<sup>260</sup> “How the police will use big data tools, particularly in future-oriented ways, is as pressing an issue of police accountability as individual officer bias, excessive force, and other pressing issues currently the topic of public debate,” see Elizabeth E Joh, “The New Surveillance Discretion: Automated Suspicion, Big Data and Policing” (2016) 10:1 *Harvard Law and Policy Review* 15 at 19 [Joh].

<sup>261</sup> Brayne, *supra* note 258.

<sup>262</sup> The OHRC has previously noted: “As most people have come to know that they cannot explicitly differentiate and judge people based on their race, racial discrimination often takes the shape of employing other less stigmatized notions and terms in the place of racial ones.” See *Policy on Racism*, *supra* note 52 at 16.

<sup>263</sup> Ferguson, *supra* note 259 at 37–38.

<sup>264</sup> *Ibid* at 49.

<sup>265</sup> *Ibid* at 38.

<sup>266</sup> Brayne, *supra* note 258.

<sup>267</sup> Kristian Lum & William Isaac, "To Predict and Serve?" (2016) 13:5 Significance 19.

<sup>268</sup> Joh, *supra* note 260 at 42.

<sup>269</sup> Christian Parenti, *Lockdown America: Police and Prisons in the Age of Crisis* (New York: Verso, 1999) at 122; Department of Justice Canada, *The Nature of Canadian Urban Gangs and their Use of Firearms: A Review of the Literature and Police Survey* (Ottawa: Research and Statistics Division, 2006) at 20.

<sup>270</sup> "That a person is a known gang member is a contestable designation," notes Joh, *supra* note 260 at 41.

<sup>271</sup> *Ibid* at 26.

<sup>272</sup> Ferguson, *supra* note 259 at 36.

<sup>273</sup> *Ibid* at 134.

<sup>274</sup> Law Society of England and Wales, *Algorithms in the Criminal Justice System* (London: Law Society of England and Wales, 2019) at 9.

<sup>275</sup> *Ibid* at 7.

<sup>276</sup> *Ibid*.

<sup>277</sup> Timothy Appleby, "Kingston police more likely to stop blacks, study finds," *The Globe and Mail* (22 April 2018), online: [www.theglobeandmail.com/news/national/kingston-police-more-likely-to-stop-blacks-study-finds/article18228211/](http://www.theglobeandmail.com/news/national/kingston-police-more-likely-to-stop-blacks-study-finds/article18228211/).

<sup>278</sup> David M. Tanovich, "E-Racing Racial Profiling" (2004) 41:4 Alberta Law Review 905 at 924.

<sup>279</sup> William J Cross, "The Kingston Police Data Collection Project: A Preliminary Report to the Kingston Police Services Board," (17 March 2005) at 2, online (pdf): [www.qspace.library.queensu.ca/bitstream/handle/1974/8656/Bias-Free%20Policing%20-%20Kingston%20Police.pdf?sequence=1&isAllowed=y](http://www.qspace.library.queensu.ca/bitstream/handle/1974/8656/Bias-Free%20Policing%20-%20Kingston%20Police.pdf?sequence=1&isAllowed=y).

<sup>280</sup> *Ibid* at 7.

<sup>281</sup> Frank R. Baumgartner, Derek A. Epp & Kelsey Shoub, *Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race* (New York: Cambridge University Press, 2018) at 213.

<sup>282</sup> *Ibid*.

<sup>283</sup> Chief of Police, Ottawa Police Service, "Report to the Ottawa Police Services Board" (29 May 2017) at 2, online (pdf): [Ottawa Police Service www.ottawapolice.ca/en/news-and-community/resources/Projects/DiversityAuditandMYAP\\_BoardReportUpdatePDF.docx.pdf](http://Ottawa Police Service www.ottawapolice.ca/en/news-and-community/resources/Projects/DiversityAuditandMYAP_BoardReportUpdatePDF.docx.pdf).

<sup>284</sup> Aiken, *supra* note 209 at paras 41–43.

<sup>285</sup> Aiken, *ibid* at para 91.

<sup>286</sup> *Supra* note 283 at 7.

<sup>287</sup> *Subject to Debate: A Newsletter of the Police Executive Research Forum* (July-September 2016) 30:2, 1 at 3, online: [Police Executive Research Forum www.policeforum.org/assets/docs/Subject\\_to\\_Debate/Debate2016/debate\\_2016\\_julsep.pdf](http://Police Executive Research Forum www.policeforum.org/assets/docs/Subject_to_Debate/Debate2016/debate_2016_julsep.pdf).

<sup>288</sup> *Ibid* at 2.

<sup>289</sup> Tom Jackman, "New Orleans police pioneer new way to stop misconduct, remove 'blue wall of silence,'" *The Washington Post* (24 January), online: [www.washingtonpost.com/crime-law/2019/01/24/new-orleans-police-pioneer-new-way-stop-misconduct-remove-blue-wall-silence/](http://www.washingtonpost.com/crime-law/2019/01/24/new-orleans-police-pioneer-new-way-stop-misconduct-remove-blue-wall-silence/).

<sup>290</sup> Lee Romney, "Homicide rates drop as Richmond chief builds bond with community," *Los Angeles Times* (2 May 2015), online: [www.latimes.com/local/crime/la-me-richmond-pd-20150503-story.html](http://www.latimes.com/local/crime/la-me-richmond-pd-20150503-story.html).

<sup>291</sup> *Ibid* at 24; Wortley, *supra* note 240 at 57–59; Ministry of the Solicitor General, *Inquest into the Death of Andrew Loku – Verdict of Coroner's Jury* (30 June 2017), online: MCSCS

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[www.mcscs.jus.gov.on.ca/english/DeathInvestigations/Inquests/VerdictsandRecommendations/OCCInquestLoku2017.html](http://www.mcscs.jus.gov.on.ca/english/DeathInvestigations/Inquests/VerdictsandRecommendations/OCCInquestLoku2017.html).

<sup>292</sup> *Police Services Act*, *supra* note 29.

<sup>293</sup> *Ibid*, s 26.1, Part V.

<sup>294</sup> *Ibid*, ss 26.1, 27, 57, Part V; Office of the Independent Police Review Director, “Systemic Reviews” (2019), online: OIPRD [www.oiprd.on.ca/news/systemic-reviews/](http://www.oiprd.on.ca/news/systemic-reviews/) [OIPRD, “Systemic Reviews”].

<sup>295</sup> OIPRD, “Systemic Reviews,” *ibid*; see also *Police Services Act*, *supra* note 29, s 57.

<sup>296</sup> *Ibid*, s 87.

<sup>297</sup> *Ibid*, s 25.

<sup>298</sup> *Ibid*, s 26.

<sup>299</sup> *Ibid*, ss 9, 23–24.

<sup>300</sup> *Ibid*, s 78.

<sup>301</sup> *Ibid*, s 113.

<sup>302</sup> *Ibid*, ss 61(5)(a)–(c), 61(6).

<sup>303</sup> *Ibid*, ss 68(3)–(6), 83(1), 83(3).

<sup>304</sup> *Ibid*, ss 82–83.

<sup>305</sup> *Ibid*, s 23(1).

<sup>306</sup> *Ibid*, s 24.

<sup>307</sup> *Ibid*, s 113.

<sup>308</sup> *Ibid*, s 60(6); Office of the Independent Police Review Director, “Complaints” (2019), online: OIPRD [www.oiprd.on.ca/complaints/](http://www.oiprd.on.ca/complaints/).

<sup>309</sup> Ontario Civilian Police Commission, Investigative Division, “Investigations of Policing Matters” (2019), online: *Tribunals Ontario, Safety, Licensing Appeals and Standards Division* [www.slsto-tsapno.gov.on.ca/ocpc-ccop/en/investigative-division/investigations-of-policing-matters/](http://www.slsto-tsapno.gov.on.ca/ocpc-ccop/en/investigative-division/investigations-of-policing-matters/); Ontario Civilian Police Commission, Investigative Division, “Frequently Asked Questions” (2019), online: *Tribunals Ontario, Safety, Licensing Appeals and Standards Division* [www.slsto-tsapno.gov.on.ca/ocpc-ccop/en/investigative-division/faqs/](http://www.slsto-tsapno.gov.on.ca/ocpc-ccop/en/investigative-division/faqs/).

<sup>310</sup> O Reg 267/10, s 3.

<sup>311</sup> Special Investigations Unit, “Investigative Process” (2019), online: *SIU* [www.siu.on.ca/en/process.php](http://www.siu.on.ca/en/process.php) [SIU].

<sup>312</sup> *COPS*, *supra* note 30. *The Comprehensive Ontario Police Services Act* received Royal Assent on March 26, 2019, but has not yet been proclaimed. Once it is proclaimed, it repeals the *Police Services Act*.

<sup>313</sup> *Ibid*, Schedule 1, *Community Safety and Policing Act, 2019*, *supra* note 30, s 133.

<sup>314</sup> *Ibid*, s 161.

<sup>315</sup> *Ibid*, s 153.

<sup>316</sup> *Ibid*, s 216(5).

<sup>317</sup> *Ibid*, s 102(4).

<sup>318</sup> *Ibid*, s 102(6).

<sup>319</sup> *Ibid*, ss 168, 202.

<sup>320</sup> *Ibid*, s 204(1).

<sup>321</sup> *COPS*, *supra* note 30, Schedule 5, the *Special Investigations Unit, 2019*, s 32.

<sup>322</sup> *Ibid*, s 35.1.

<sup>323</sup> *COPS*, *supra* note 30, Schedule 1, *Community Safety and Policing Act, 2019*, *supra* note 30, s 124 (1).

<sup>324</sup> *Ibid*, s 124(2).

<sup>325</sup> *Ibid*, s 125(1).

<sup>326</sup> *Ibid*, s 125(4).

<sup>327</sup> *Ibid*, s 126(1).

<sup>328</sup> *Ibid*, s 126(2).

<sup>329</sup> *Ibid*, s 128(1).

<sup>330</sup> *COPS*, *supra* note 30, Schedule 5, the *Special Investigations Unit, 2019*, s 16.

<sup>331</sup> *Ibid*, s 17.

<sup>332</sup> *SIU*, *supra* note 311.

<sup>333</sup> *Ibid* at s 106(1).

<sup>334</sup> *COPS*, *supra* note 30, *Community Safety and Policing Act, 2019*, *supra* note 30, s 124(1).

<sup>335</sup> *Supra* note 37.

<sup>336</sup> *Sinclair*, *supra* note 38.

<sup>337</sup> Graham Hudson et al, *(No) Access T.O.: A Pilot Study on Sanctuary City Policy in Toronto, Canada* (Toronto: Ryerson Centre for Immigration & Settlement, 2017) at 4, online: *Ryerson Centre for Immigration and Settlement* [www.ryerson.ca/rcis/publications/rcisworkingpapers/](http://www.ryerson.ca/rcis/publications/rcisworkingpapers/) [Hudson et al].

<sup>338</sup> Commission on Systemic Racism in the Ontario Criminal Justice System, *supra* note 39 at 40–41; Hudson et al, *ibid*.

